Supreme Court of the United States

OCTOBER TERM 1945

No. 429

MOSES B. SHEER,

Petitioner,

against

ANACONDA WIRE AND CABLE COMPANY and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

MOSES B. SHEER,
Petitioner pro se.

TABLE OF CONTENTS

TABLE OF CASES

AUTHORITIES

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PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the United States and to the Honorable the Chief Justice and the Justices thereof:

The petition of the relator, Moses B. Sherr, for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit respectfully shows to this Court:

A

The Jurisdiction of This Court

The jurisdiction of this Court rests upon §240 of the Judicial Code, 28 U. S. C., §347.

B

Summary Statement of the Matter Involved

Petitioner asks this Court to review the Circuit Court's affirmance (R. 69) of the judgment of the District Court for Southern New York dismissing the action for lack of jurisdiction (R. 46). A review is also sought of the Circuit Court's denial of rehearing (R. 68).

The opinion of the District Court (R. 47), by Leibell, D. J., is reported 57 F. Supp. 106. That of the Circuit Court (R. 60), by L. Hand and Clark, C. JJ. (Clark, C. J., concurring), is reported 149 F. 2d 680.

The Circuit Court filed its opinion on May 25, 1945 (R. 60). On June 5, 1945, within the fifteen days allowed by Rule 27 of the Circuit Court, petitioner moved for a rehearing (R. 62) which the Circuit Court denied on June 8, 1945 (R. 68). The Circuit Court's judgment of affirmance was entered June 16, 1945 (R. 69).

1. Character of the action

This is a *qui tam* action brought by the petitioner as relator on behalf of himself and the United States against the Anaconda Wire and Cable Company ("Anaconda" hereafter) pursuant to the False Claims Statute, 12 Stat. 698; R. S., §§3490-3493; 31 U. S. C., §§231-234 (Appendix A, *infra*, p. 32).

The complaint (R. 3) alleges that Anaconda, under contracts with the Army and Navy, delivered defective wire and cable. Anaconda and some of its officials—who are named as defendants but have not been served—fraudulently concealed the defects and thus induced the Government to accept delivery and to pay the contract price. The complaint demands judgment in favor of the United States and petitioner for double the damages sustained by the United States, for the statutory forfeitures, for interest and costs.

2. The proceedings below

The action was commenced December 23, 1942, in the District Court for Southern New York (R. 1). Concededly it was based on information which was then in the possession of the United States (R. 35).

One year after the suit was brought, on December 23, 1943, Congress amended the False Claims Statute: Ch. 377, Public Law No. 213, 78th Congress, First Session, 57

Stat. 608-9 (Appendix B, *infra*, p. 35). In March, 1944, following the amendment, the Government entered its appearance in this action (R. 8, 9). But two months later, in May, 1944, it commenced an independent suit of its own for the wrongs herein alleged (R. 36, 19).

In the present action the following motions were then made:

1. Petitioner moved to strike the Government's appearance (R. 10);

2. The Government moved to stay the prosecution of this action pending determination of its own suit (R. 13); and

3. Anaconda moved to dismiss this action on the ground that the 1943 amendment of the False Claims Statute had deprived the District Court of jurisdiction (R. 28).

Petitioner predicated his motion, and opposed those of the Government and of Anaconda, on the ground, among others, that the 1943 amendment, as applied to this case, deprives him of his property without due process of law, in violation of the Fifth Amendment of the Constitution (R. 11-12, 36-37).

The District Court denied the motions of petitioner and of the Government (R. 47). It found (as was conceded) that this suit is based on information in the possession of the United States at the time this suit was brought (R. 47); it sustained the constitutionality of the 1943 amendment; and it dismissed the action on the ground that the amendment had deprived it of jurisdiction (R. 46).

The Circuit Court, likewise upholding the new statute, affirmed (R. 60, 69) and, without further opinion, denied rehearing (R. 68).

3. The False Claims Statute, its interpretation by this Court, and its 1943 amendment

(a) *The pre-1943 statute*: The False Claims Statute (Appendix A, *infra*, p. 32) requires any person making fraudulent claims against the United States Government to pay it double damages, a forfeiture of $2,000 and the costs of the suit; R. S., §3490. The district courts of the United States have *exclusive* jurisdiction of such suits; R. S., §3491; Judicial Code, §256 (2), 28 U. S. C., §371 (2). These provisions have not been affected by the 1943 amendment.

Prior to the 1943 amendment the statute permitted "any person" to bring and carry on such suit "as well for himself as for the United States". The relator had to bear the "sole cost and charge" of the suit; he was not to withdraw it without the written consent of the Judge and the District Attorney; R. S., §3491.

The person "bringing said suit and prosecuting it to final judgment" was entitled to "one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect", and to all costs the Court might award against the defendant. The other half of the forfeiture and damages was to "belong to and be paid over to the United States". The relator was to be "liable for all costs incurred by himself" and was to "have no claim therefor on the United States". Costs were to be taxed according to any law or rule governing "suits between private parties"; R. S., §3493.

(b) *The interpretation of the statute by this Court:* In *U. S. ex rel. Marcus* v. *Hess*, 317 U. S. 537, at 545-8 (1943), this Court held, over the strenuous objection of the Government appearing as *amicus curiae*, that a relator could prosecute a *qui tam* action under the False Claims Statute even though he had derived all his information from the Government. "One of the chief purposes of the Act * * * was to stimulate action to protect the government against war frauds" (p. 547), even where the frauds were known to the Government. The statute was born out of the

apprehension of Congress that, because of official inertia, ineptness or dishonesty, even those frauds known to the Government would not be prosecuted with due zeal and skill. Congress therefore applied to the citizenry at large; invited them to undertake, at their own expense, the protection of their Government against fraud; and assured them, if successful, of a generous reward.

Promptly after the decision of the *Marcus* case the Government asked Congress to amend the False Claims Statute (*Cong. Rec.*, 78th Cong., 1st Sess., p. 5872, col. 1; p. 7571, col. 2-3; *House Rep.* No. 263). The amendment was enacted on December 23, 1943, one year after the commencement of this action (57 Stat. 608-9). References to the Congressional debates and other legislative materials are set forth in the footnote.*

(c) *The 1943 amendment of the False Claims Statute:* The amendment (Appendix B, *infra*, p. 35), repealed R. S., §3493, and completely reframed R. S. §3491. *Qui tam* actions (whether pending at the time of the amendment or brought thereafter) can be maintained only if they are based on information original with the relator. Notice of any such suit must be given to the United States Attorney who, within sixty days, may enter his appearance in the suit and take it over. If he does, the relator may be awarded reasonable compensation for the disclosure of his evidence or information, but not more than one-tenth of the recovery. If the United States Attorney does not take over, the relator may prosecute the action, in which case he may be awarded up to one-fourth of the recovery.

For present purposes it suffices to quote only one provision of the amendment:

> "The court shall have no jurisdiction to proceed with any * * * pending suit brought under this section whenever it shall be made to appear that such suit was based upon evidence or information in the possession

* 78th Cong., 1st Sess., *Sen. Rep.* No. 291, Parts 1 and 2; *House Rep.* Nos. 263 and 933; *Cong. Rec.*, pp. 2800-1, 5871-3, 7347, 7424, 7437-44, 7570-9, 7596-9, 7600-17, 10696, 10741-52, 10844-9.

of the United States, or any agency, officer or employee thereof, at the time such suit was brought" R. S., §3491 (C), as amended).

Once a *qui tam* suit is dismissed under this provision, the Government may bring an action of its own upon the same cause, for the whole amount of the forfeiture and damages allowed by the statute; and the relator in the first suit has no right to share in the Government's recovery.

The Courts below dismissed this action on the strength of the quoted provision.

4. The issues below

In the Courts below the basic question, whether the 1943 amendment takes petitioner's property without due process of law, resolved itself into several sharply contested issues.

(a) Petitioner contended that he has a contract right against the United States, protected by the Constitution, to prosecute this suit to judgment and to collect his half of the recovery. The pre-1943 False Claims Statute, said petitioner, constituted an offer of such a contract; and by commencing this suit petitioner accepted it (see Brief, *infra*, pp. 20-25).

Respondents denied that the False Claims Statute was an offer; but if it was, they argued that it could be revoked at any time before petitioner recovered final judgment; and the 1943 amendment effected the revocation.

(b) Independent of his contract theory, petitioner contended that upon commencement of this suit he became *by operation of law* the owner (as assignee *ex lege*) of one-half of the Government's claim against Anaconda; as such he had a vested right in the cause of action which could not be reappropriated by the Government. For this contention petitioner invoked a long line of authorities in England and in this country (see Brief, *infra*, pp. 13-20). Respondents denied their applicability.

(c) Petitioner contended that his rights were taken by the 1943 amendment. For although in terms the amendment purported only to terminate the jurisdiction of the district courts, it in effect destroyed petitioner's rights, since the district courts were the only and exclusive forum available to him, 28 U. S. C., §371 (2) (see Brief, *infra*, pp. 25-26).

Respondents, in turn, insisted that Congress is free to regulate the jurisdiction of the district courts (Constitution, Art. III, §1) and that the 1943 amendment was only an exercise of that power.

Such were the issues below. But the Circuit Court, as will presently be seen, avoided their determination and preferred to place its decision on a ground not raised, argued or briefed by any of the parties.

5. The opinions below

(a) *The District Court's opinion* (R. 47): In sustaining the constitutionality of the 1943 amendment, the District Court followed the reasoning of a dictum in *U. S. ex rel. Rodriguez* v. *Weekly Publications, Inc.*, 144 F. 2d 186, at 188 (C. C. A. 2, 1944). In the *Rodriguez* case the Circuit Court had stated (on the authority of *Norris* v. *Crocker*, 13 How. (54 U. S.) 429 (1854), and similar cases) that the "privilege of conducting the suit on behalf of the United States and sharing in the proceeds of any judgment recovered was an award of statutory creation which, prior to final judgment, was wholly within the control of Congress", and that the claim of unconstitutionality was "wholly illusory".

(b) *The Circuit Court's per curiam opinion* (R.): Upon petitioner's appeal herein, the Circuit Court professed to "see no reason to recede from the position" taken in the *Rodriguez* case. Having so said, the Circuit Court promptly abandoned that position and advanced an altogether new ground. It assumed, for argument, that petitioner was right in contending that the 1943 amend-

ment effected a "taking" of his property. But that "taking", it held, was not unconstitutional since it was not without "just compensation". For, according to the Circuit Court, by taking petitioner's property the Government impliedly contracted to pay him compensation, *U. S.* v. *Lynah*, 188 U. S. 445 (1903); petitioner may sue upon that implied contract in the Court of Claims, 28 U. S. C., §250 (1); and that recourse is an adequate remedy, *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18 (1940); *Hurley* v. *Kincaid*, 285 U. S. 95 (1932).

In his application for rehearing (R. 62) petitioner urged that not every governmental taking of property raises an implied contract to pay compensation; such contract is implied only where the Government "takes property the ownership of which it concedes to be in an individual"; *U. S.* v. *Lynah, supra*, 188 U. S., at 465; *Tempel* v. *U. S.*, 248 U. S. 121, at 129-130 (1918). Here not even the Circuit Court "conceded" that petitioner had ownership rights in the property taken (i.e., the claim against Anaconda); much less did Congress so concede (see Brief, *infra*, pp. 27-30). Hence, no promise to pay compensation can be implied. Furthermore, even if it were assumed that Congress promised to pay compensation, still, under the Fifth Amendment, it could take petitioner's property only "for public use"; *Rindge* v. *Los Angeles*, 262 U. S. 700, at 705 (1923). A taking which, as here, merely swells the general treasury of the United States does not meet this test and is, therefore, without due process of law (see Brief, *infra*, pp. 30-31).

C

The Questions Presented to This Court

The precise question before this Court is:

> Does the 1943 amendment of the False Claims Statute, as applied to this case, deprive petitioner of

his property without due process of law, in violation of the Fifth Amendment of the Constitution of the United States?

In *Nathanson* v. *U. S.*, 321 U. S. 746 (1944), this question was reserved. It is now squarely presented.

The answer depends on a number of subsidiary questions:

1. Has the relator in a private suit under the False Claims Statute a *contract right* against the United States, protected by the Constitution, to seek judgment for and to collect his half of the recovery?

The Circuit Court's *per curiam* opinion avoids an answer. But if, as we believe, the Circuit Court's own ground of decision (that petitioner has an adequate remedy in the Court of Claims) fails, the question must be answered.

Even if a contract between the United States and petitioner were denied, the question would remain:

2. Does a relator suing under the False Claims Statute acquire, *by operation of law*, a property right in the cause of action, protected by the Constitution?

Again the Circuit Court, although apparently impressed by our authorities, avoided the answer. But again that answer is called for, if, as we propose to show, the Circuit Court's own ground lacks force.

3. Does the power of Congress to regulate the jurisdiction of the district courts (Constitution, Art. III, §1) sustain the 1943 amendment?

Respondents so argued. But under the guise of regulating jurisdiction the 1943 amendment deprived petitioner of the only forum available to him, thereby in effect destroying his right.

Finally, the question going to the heart of the Circuit Court's decision is:

> 4. Can the taking of petitioner's property be sustained on the ground that he may sue the United States for compensation in the Court of Claims?

D

Grounds for Granting the Writ of Certiorari

1. The constitutionality of the 1943 amendment of the False Claims Statute, as applied to *qui tam* actions pending at the time of its enactment, has not been, but should be, determined by this Court.

(a) The rights of a litigant under the Constitution are commended to the particular vigilance and protection of this Court. The Court below ruled that the constitutionality of the 1943 amendment is "the bare question before us" (R. 61). An application for review in such a case should strongly appeal to the discretion of this Court.

(b) At the time of the enactment of the 1943 amendment there were pending more than 250 private actions under the False Claims Statute (*Cong. Rec.*, 78th Cong., 1st Sess., p. 10845, col. 3, p. 10846, col. 1). Their fate will be controlled by the decision of this Court.

(c) This Court's decision will also control *qui tam* actions hereafter to be brought under the 1943 amendment. For where the Government fails or refuses to enter its appearance in such an action within the sixty-day period allowed by R. S., §3491(C), as amended, the relator's position under the new statute is substantially the same as under the old. If the decision below is permitted to stand, the relator in any such action will, until final judgment therein, remain in danger of being ousted by the Government, be it by legislative or executive action. To cast such

a cloud of uncertainty upon every future *qui tam* action would hardly encourage the institution of this type of suit, although Congress manifestly intended its preservation. And this is equally applicable to the numerous other types of *qui tam* actions authorized by federal statutes, such as 35 U. S. C., §50, and other statutes cited in *U. S. ex rel. Marcus* v. *Hess, supra,* 217 U. S., at 541, n. 4.

Even before the 1943 amendment was enacted, the Eighth Circuit Court held, in *U. S.* v. *Baker-Lockwood Mfg. Co.,* 138 F. 2d 48, at 52-3 (1943), rev'd on other grounds *sub nom. Nathanson* v. *U. S.,* 321 U. S. 746 (1944), that the Government may supersede an earlier *qui tam* action by filing a suit of its own. Respondents deduce that the relator in a *qui tam* suit can have no vested right. But the Court below declared the *Baker-Lockwood* case "open to conceivable doubt" (R. 61); it is, we submit, in conflict with earlier authorities (*infra,* p. 17); and it seems refuted by this Court's dictum in *U. S. ex rel. Marcus* v. *Hess, supra,* 317 U. S., at 547-8, that only the filing of a *prior* suit by the Government bars a later *qui tam* action. But the Government claims that the *Baker-Lockwood* case is still controlling (R. 20). The conflict of authorities emphasizes the need for review by this Court.

2. In ruling that petitioner's property was not unconstitutionally taken because he may sue for compensation in the Court of Claims, the Circuit Court decided a federal question in a way probably in conflict with applicable decisions of this court, such as *U. S.* v. *Lynah,* 188 U. S. 445 (1903); *Tempel* v. *U. S.,* 248 U. S. 121 (1918); *John Horstman Co.* v. *U. S.,* 257 U. S. 138 (1921). We propose to show this conflict in our brief (*infra,* pp. 27-30). If the decision below were permitted to stand, it would have most prejudicial effects. The Government, although not purporting to act under its power of eminent domain, could be made a condemnor *in invitum* of property which it never intended to expropriate; and it could be sued for compensation in the Court of Claims although it demonstrably

never intended to make a contract for compensation. And on the other hand the Circuit Court's decision would expand the concept of "public use", for which property may be taken by eminent domain, beyond all limits heretofore recognized by this Court.

If the decision below is reversed and petitioner is permitted to prosecute this action, the Government need not fear that it cannot safeguard its interests. Its remedy is by intervention, Rule 24 F. R. C. P., which may even be obligatory upon the Government, R. S., §3492. Petitioner will certainly not oppose it.

WHEREFORE, petitioner prays that a writ of certiorari to the Circuit Court of Appeals for the Second Circuit be granted.

MOSES B. SHERR,
Petitioner pro se.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

MOSES B. SHERR, being duly sworn, deposes and says; that he is the petitioner herein; that he has read the within petition and knows the contents thereof; that the same is true to his own knowledge, except as to those matters therein stated upon information and belief, and that as to those matters he believes it to be true.

MOSES B. SHERR.

Sworn to before me this
12th day of September, 1945.

SYLVIA SOBELMAN,
Notary Public.
King's Co. Clk's No. 357, Reg. No. 365S6.
N. Y. Co. Clk's No. 468, Reg. No. 271S6.
Commission expires March 30, 1946.

Supreme Court of the United States

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MOSES B. SHERR,

Petitioner,

against

ANACONDA WIRE AND CABLE COMPANY and UNITED STATES OF AMERICA,

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

POINT I

Upon bring a private suit under the False Claims Statute, the relator acquires, *by operation of law*, a property right in the cause of action which is immune from governmental interference.

1. The *qui tam* action was "well known in England, whence we imported it;" *Sutherland* v. *Int'l Ins. Co.*, 43 F. 2d 969, at 970 (C. C. A. 2, 1930); see *Marvin* v. *Trout*, 199 U. S. 212, at 225 (1905). Resort to the English authorities is, therefore, appropriate. They establish that the relator acquires a vested right upon commencement of suit.

Year Book 1 Henry VII, folio 3 a (Mich. T., Plea 2 [1485]), reports:

> "Quand cesti qui voit suir ad un fois son action commence, or est l'action sien, et nemy popularis: car par

> son suit commence il ad fait accion populer estrange son propre accion, le quel le Roy, ne nul autre poit relesser quant a son interest, et le condemnation et le acquital le party a son suit est barre a touts gens, et encontre le Roy, et uncore le Roy en touts ceux cases devant ascun accion commence par estranger, poit celle pardonner et relesser, et ce sera barre encontre touts gens. Quod Nota bene: car ce divisite fuit granted, et denie par nulluy." *

It is thus the commencement of action, not the recovery of judgment, which vests one-half of the cause of action in the *qui tam* plaintiff. Once the action is begun, not even the Sovereign can impair the rights of the relator.

The Year Book rule has been consistently followed in England; *Stretton* v. *Tayler,* Cro. Eliz. 138, 78 Eng. Rep. 395; *Hammon* v. *Griffith,* Cro. Eliz. 583, 78 Eng. Rep. 826; *Dr. Foster's Case,* 11 Coke 65 b, note, 77 Eng. Rep. 1235, note.

It is reaffirmed in 3 *Coke Inst.* 238:

> "After an action popular be brought, *tam pro domino rege, quam pro se ipso,* according to any statute, the king cannot discharge but his own part, and cannot discharge the informer's part, because by the bringing of the action he hath an interest therein; but before action brought, the king may discharge the whole * * *."

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* "Once the person who desires to sue (in a popular, or *qui tam* action) has commenced his action, the action is his and it is no longer a popular action; for by bringing his suit he has rendered his own the (theretofore) strange popular action, and neither the King nor anyone else can release it so far as his interest is concerned; judgment for or against the defendant in his action is a bar against the whole world and even the King; but in all those cases in which a stranger has not yet commenced an action, the King can forgive and release the claim and that will constitute a bar against all the world. And note this well: for this distinction was granted, and it was denied by no one." (Parenthetical interpolations added.)

The 18th century authorities are to the same effect:

4 *Blackstone, Commentaries,* 399:

> "Neither, lastly can the king pardon an offence against a popular or penal statute, after information brought; for thereby the informer hath acquired a private property in his part of the penalty."

Accord:

> *Bacon's Abridgment, verbo "Pardon" (B);*
> *Hawkins, Pleas of the Crown,* bk. 2, ch. 26, sec. 64 (7th Ed., 1795).

The same rule is sustained by the authority of Lord Mansfield. In *Couch* v. *Jefferies,* 4 Burr. 2460, 98 Eng. Rep. 290 (1769), a *qui tam* action had been brought to recover a penalty. After verdict for plaintiff, but *before judgment entered,* an Act of Parliament remitted the penalty. Defendant's motion to set the verdict aside was denied:

> "Here is a right vested; and it is not to be imagined that the Legislature could by general words mean to take it away from the person in whom it was so legally vested, and who had been at a great deal of cost and charge in prosecuting. They certainly meant future actions. Otherwise, it would be punishing the innocent instead of the guilty. It can never be the true construction of this Act; to take away this vested right and punish the innocent pursuer of it with costs."

The decision turned upon an interpretation of the statute; but it held that the right of the *qui tam* plaintiff, even before judgment, is "vested".

2. These authorities are controlling here. In framing the False Claims Statute, Congress did not purport to chart an unknown course. Even the language of the statute: "as well for himself as for the United States" (R. S.,

§3491), is an almost literal adaptation of the *"tam pro domino rege quam pro se ipso"* of English usage. By following the English phraseology Congress manifested its intent to adopt the legal incidents of the English *qui tam* action.* Hence it is well understood that the private suit authorized by the False Claims Statute is the exact equivalent to, and successor of, the English *qui tam* action; *U. S.* v. *Griswold,* Fed. Cas. No. 15,266 (D. C. Ore., 1877); see *Pollock* v. *Steamboat Laura,* 5 Fed. 133, at 136 (D. C., S. D. N. Y., 1880).

The "vested right" which, under the English authorities, the relator acquires in the cause of action upon bringing suit thereon, has therefore been recognized in this country. In *U. S.* v. *Griswold,* 24 Fed. 361 (D. C. Ore., 1885), aff'd 30 Fed. 762 (C. C. Ore., 1887), a relator, suing under the False Claims Statute, had recovered judgment of more than $23,000. Before anything was collected, the Government purported to release the claim for $100. The court refused to give effect to the release:

> *"By virtue of the statute* prescribing the forfeiture and damages recovered in this case, and authorizing any one to sue for them who would, *the defendant, Griswold, became bound to pay the same to the prosecutor herein, the one-half for himself and the other half for the use of the United States. The law implied a contract to that effect,* and the judgment obtained *thereon* is so far the private property of the prosecutor, and cannot be released or satisfied without his consent, any more than if it had been obtained in a private action on the bond of the defendant. 3 Bl. Comm. 159. For, although the king might, by a pardon of the offender, bar or prevent a popular action before it was commenced, *he could not, by this or any other means known to the law, interfere with its prosecution after it was commenced,* or release or dis-

* Story, J., held in *Pennock* v. *Dialogue,* 2 Pet. (27 U. S.) 1, at 18 (1829), that "where English statutes—such, for instance, as the statute of frauds, and the statute of limitations—have been adopted into our own legislation, the known and settled construction of those statutes by courts of law has been considered as silently incorporated into the acts, or has been received with all the weight of authority."

pose of the prosecutor's interest in the judgment therein. 6 Bac. Abr. 134; 4 Bl. Comm. 399; Whart. Crim. Pl., §528; 1 Bish. Crim. Law, §§909, 911; *U. S.* v. *Lancaster,* 4 Wash. C. C. 64; *Shoop* v. *Com.,* 3 Pa. St. 126; *U. S.* v. *Harris,* 1 Abb. (U. S.) 110; *Ex parte Garland,* 4 Wall. 381; 2 Hawk. P. C. c. 37, §§34, 54." (24 Fed., at 364; italics added)

It is true that the relator in the *Griswold* case had recovered judgment; but the court did not view this fact as material. The bringing of suit was held to control; in this the court followed Blackstone whom it cited.

Another outgrowth of the same doctrine is the rule that commencement of a *qui tam* action precludes later suit on the same cause by anyone else. Such was the law in England, *Hutchinson* v. *Thomas,* 2 Lev. 141, 83 Eng. Rep. 488; *Jackson* v. *Gisling,* Str. 1169, 93 Eng. Rep. 1105; *Combe* v. *Pitt,* 3 Burr. 1423, 97 Eng. Rep. 907; and such it is here, *U. S.* v. *Anaconda Wire & Cable Co.,* 52 F. Supp. 824 (D. C., E. D. Pa., 1943); *U. S. ex rel. Benjamin* v. *Hendrick,* 52 F. Supp. 60 (D. C., S. D. N. Y., 1943). For the purpose of this rule "the United States stands • • • just as does 'any person' ", *U. S.* v. *Dwight Mfg. Co.,* 213 Fed. 522, at 524 (D. C. Mass., 1914). Hence, "whichever—the informer or the district attorney—first commences an action for a particular violation of the statute, thereby excludes the other from so doing", *U. S.* v. *Griswold, supra,* Fed. Cas. No. 15,266; *Commonwealth* v. *Howard,* 13 Mass. 221, at 222 (1816); *State* v. *Bishop,* 7 Conn. 181, at 185 (1828); *Hawkins, P. C., supra.*•

Indeed, so strong is the vested right of the relator in a *qui tam* action first commenced, that even a judgment dismissing on the merits a second suit, brought by another on the same cause, does not bar the further prosecution of the first; *Beadleston* v. *Sprague,* 6 Johns. (N. Y.) 101 (1810).

• That the contrary decision in *U. S.* v. *Baker-Lockwood Mfg. Co.,* 138 F. 2d 48, at 51-53 (C. C. A. 8, 1943), rev'd on other grounds *sub nom. Nathanson* v. *U. S.,* 321 U. S. 746, is questionable was recognized by the Court below (R. 61).

3. The "vested right" in the cause of action against Anaconda which petitioner thus acquired upon bringing this suit, could not validly be taken by Congress. It is elementary that "a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference"; *Pritchard* v. *Norton*, 106 U. S. 124, at 132 (1882). This Court has recognized "the general rule that it is not consistent with due process to take away from a private party a right to recover the amount that is due when the act is passed"; *Graham* v. *Goodcell*, 282 U. S. 409, at 426 (1931). This is as true under the Fifth Amendment, *Graham* v. *Goodcell, supra; Osborn* v. *Nicholson*, 13 Wall. (80 U. S.) 654, at 662 (1872), as it is under the Fourteenth, *Forbes Pioneer Boat Line* v. *Everglades Drainage District*, 258 U. S. 338 (1922); *Ettor* v. *Tacoma*, 228 U. S. 148, at 155-6 (1913), and under the "great and fundamental principle of a republican government", *Wilkinson* v. *Leland*, 2 Pet. (27 U. S.) 627, at 657-8 (1829).

When Anaconda presented its fraudulent demand to the United States and collected thereon, it became immediately obligated to pay the statutory forfeiture and damages. And when petitioner started this suit, one-half of this amount became due to him. Under the "general rule" of *Graham* v. *Goodcell, supra*, the 1943 amendment of the False Claims Statute could not deprive him of that right.

4. Respondents argued below that, before judgment, petitioner's right is not "vested" because he is "entitled to receive" his moiety only upon "prosecuting it (the suit) to final judgment", R. S., §3493. But this language only indicates that the proceeds of the litigation cannot be divided before they are recovered. Before judgment and collection the Government is just as unable as petitioner to receive any part of the recovery; yet its right is certainly "vested" rather than "inchoate". As was said in *Robison* v. *Beall*, 26 Ga. 17, at 47 (1858):

"The penalty is 'to be sued for', 'on the application of an informer'. Of course, then, the right to *sue* for the penalty and, by the suit, to recover the penalty, is to vest in the informer. True, the Act says that the money, 'when recovered', is to be paid, one-half to the State, and the other half to the informer; but this is not saying that the right to these halves, respectively, is not to vest before the recovery. The time when money is to be paid is no test of the time when the right to the money vests. *Debitum in presenti, solvendum in futuro,* is a common case. Suppose this penalty paid after suit, but before recovery, would not the informer be entitled to one-half of it? Surely he would."

5. Respondents also claimed that this suit is for a "penalty" which, until judgment, may be defeated by the repeal of the penalty statute; *Norris* v. *Crocker,* 13 How. (54 U. S.) 429, at 440 (1851); *Pope* v. *Lewis,* 4 Ala. 487 (1842). But this rule, assuming it to be applicable to *qui tam* actions, does not aid respondents. In the first place, the False Claims Statute is not a "penalty" law. Double damages, such as those allowed by R. S., §3490, are no penalty; see *Overnight Motor Transp. Co.* v. *Missel,* 316 U. S. 572, at 583-4 (1942). The "device of double damages plus a specific sum" in the False Claims Statute was chosen to make the Government whole, not to punish the wrongdoer, *U. S. ex rel. Marcus* v. *Hess,* 317 U. S. 537, at 551-2 (1943). A right to "damages" is property and is protected by the Constitution, even before judgment has been recovered thereon, *Angle* v. *Chicago etc. R. Co.,* 151 U. S. 1, at 19 (1894); and this is true even where the right to damages is created by statute, *Ettor* v. *Tacoma,* 228 U. S. 148 (1913).

Secondly, even if this were a penalty suit, the 1943 amendment did not "repeal" the penalty, but reconveyed it to the Government. The Court below recognized (R. 61) that the rule of *Norris* v. *Crocker, supra,* applicable only to *repeals,* does not support such *reconveyance.* A penalty suit falls with the *repeal* of the statute* because of "the

* But see R. S., §13, 1 U. S. C., §29.

injustice of punishing a man for an act which the law no longer considers a crime", *Bank of St. Mary's* v. *Georgia*, 12 Ga. 475, at 482 (1853). In the present case the "penal" policy of the United States has not changed; Anaconda is still liable for forfeitures and double damages. What did change is the Government's willingness to share the recovery with petitioner. But such change of mind is not authorized by any precedent. Even an attempt by Congress to *release* an informer's share in a penalty, while retaining the Government's own share, has been condemned, *M'Lane* v. *U. S.*, 6 Pet. (31 U. S.) 404, at 426-8 (1832); the Government's *appropriation* of petitioner's share must fail *a fortiori*.

POINT II

Petitioner also has a *contract* right against the United States to prosecute this suit to judgment and to collect his share of the recovery.

If it were assumed, for argument, that the pre-1943 False Claims Statute should be construed *in vacuo*, without regard to the precedents in England and in this country, petitioner would still have a contract right inviolable under the Constitution.

1. If a private party were to invite another, in terms comparable to those of the False Claims Statute, to bring an action on his behalf, the institution of such suit would create a binding contract. Suppose that A, a victim of fraud, says to B: "You may bring an action upon my claim, as well for yourself as for me; if you do, you shall bear all costs and you shall not discontinue without my written consent; if you recover judgment, one-half of all amounts collected is yours." If B responds by bringing the action, a contract results which A cannot lawfully repudiate.

It is true that B has earned his share only if he succeeds and collects. But the formation of a valid contract

is not postponed until then. For B, by bringing the suit, agrees not to discontinue it and to bear the costs. A binding contract arises therefore at once; and the procurement of a judgment is merely the performance of B's undertaking, but not a condition for the formation of the contract. *Williston, Contracts* (Rev. Ed., 1936), Vol I, §60, p. 166; *Restatement, Contracts,* §31; *Wood* v. *Duff-Gordon,* 222 N. Y. 88, at 91 (1917).*

Nor is the legal effect of A's offer changed if it is addressed to the public at large. "General offers" are well recognized; *Restatement, Contracts,* §28; *Williston, supra,* §32, pp. 77 *et seq.* The contract is made with the first person accepting the offer, *Williston, supra,* p. 78.

2. The legal implications of the transaction are the same if A is the Government of the United States, speaking through a statute.

> "It has become the established law that a legislative enactment, in the ordinary form of a statute, may contain provisions which, when accepted as the basis of action by individuals or corporations, become contracts between them and the state * * *" (12 Am. Jur., Const. L., §406, p. 37, citing cases).

In determining the presence of a contract the language of the statute is entitled to "practical, common-sense construction", *Russell* v. *Sebastian,* 233 U. S. 195, at 205 (1914).

The False Claims Statute employs language which, if used by a private party, would amount to the offer of a contract. That the offer was made in the solemn form of a statute duly enacted by Congress does not render it any less obligatory. The offer, like that of a private

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* Even if A's offer were only for a "unilateral contract" and hence could be "accepted" only by full performance on the part of B, the offer would become irrevocable when B, by commencing suit, incurs labor, expense and liability for costs; *Restatement, Contracts,* §§45, 90; *Williston, supra,* §60A, p. 170.

party, can be accepted and made irrevocable by bringing suit.

Russell v. *Sebastian, supra,* 233 U. S. 195, illustrates the rule. The California Constitution had authorized "any individual or any company" to lay gas or water pipes in the public streets of any city having no public water or gas works (p. 198). Despite "the generality of the provision with respect to all persons and cities", it was held to constitute the offer by the state of a contract (p. 203); the commencement of the laying of pipes by a company constituted "acceptance in fact" (p. 203), since the company had thereby "changed its position beyond recall" (p. 208); and the resulting contract (p. 204) was held to survive the repeal of the constitutional provision. Even after the repeal the company was held to have the contract right further to expand its system (p. 208). For since it could not discontinue its services and was, in fact, obligated to meet all reasonable requirements of the community, it had the "correlative" "right to serve", including the "privilege to install the means of service" (pp. 208-9).

The False Claims Statute was similarly addressed to "any person" (R. S., §3491). Institution of suit by petitioner constituted "acceptance in fact" of the statutory offer; for it involved petitioner in expense, labor and liability for costs (R. S., §3493), thereby "changing his position beyond recall." And since petitioner is obligated not to discontinue (R. S., §3491), he must have the "correlative right" to prosecute his suit to judgment and collection.

3. Other considerations forcefully support the contractual character of the relation. The False Claims Statute is not just a law dictated by public policy and the general good. The Government, if defrauded, is in a position little different from that of a private claimant. It has a monetary interest of its own. By inviting another to sue on its behalf and to split the proceeds, it descends from its pedestal as lawmaker to the arena of the bar-

gaining individuals. "You sue for me, and you shall have half of the recovery": This is the language and the proper subject-matter of contract, even if embodied in a statute.

4. It is true that Judge Clark, in his concurring opinion below (R. 62), could "see no contract in any real sense between the relator and the sovereign, only a method of law-enforcement by private individuals under the stimulus of a reward for successful accomplishment, but with nothing to prevent the sovereign from resuming enforcement itself before the reward has been earned".

But this reasoning would seem less than convincing. To say that there is "no contract in any real sense" falls short of showing why there is not. And to say that the statute provides a "method of law-enforcement" is not inconsistent with the existence of a contract made for that very purpose. But Judge Clark's opinion steps on really dangerous ground in holding that the reward, although held out as a "stimulus" to invite action, may be withdrawn at any time before it is "earned". Such a rule would make the statute a trap and a snare for those who trustingly, upon the Government's invitation, incur expense, labor and liability for costs, only to find themselves ultimately ousted by the Government's "resuming enforcement itself." To find that Congress sanctioned a rule of so immoral operation would require clearer support in the statute than its language affords. And it need hardly be added that Judge Clark's opinion does not touch our primary contention that, regardless of any contract, petitioner has by operation of law a vested property right in the cause of action (*supra*, Point I).

5. If petitioner has a contract right against the United States, the Fifth Amendment protects it against Governmental interference, whether by Congress or by the Executive; *Lynch* v. *U. S.*, 292 U. S. 571, at 579 (1934):

> "Rights against the United States arising out of a contract with it are protected by the Fifth Amend-

ment. When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."

Accord: *Perry* v. *U. S.*, 294 U. S. 330, at 350-3 (1935).

6. But respondents contended below that petitioner's contract right, if any, was at most an agency and could be terminated by the Government at its will, subject only to petitioner's right to damages or *quantum meruit; Restatement, Agency,* §§118, 455. Respondents deduced that petitioner, whatever his rights against the Government, can no longer prosecute this action.

But petitioner is not the Government's agent. An agent is "a person authorized by another to act on his account and under his control"; *Restatement, Agency,* §1, Comment (d). Under the False Claims Statute petitioner acted neither on account of the Government nor under its control. The statute expressly provided that petitioner was to sue "as well for himself as for the United States", R. S., §3491. To the extent that he sued "for himself", he acted for his own account. Nor was petitioner under the Government's control; for under the False Claims Statute the relator has the "sole control" of his suit, except upon discontinuance; *Bush* v. *U. S.*, 13 Fed. 625, at 629 (C. C., Ore., 1882); *U. S.* v. *Griswold,* Fed. Cas. No. 15266(D. C., Ore., 1877); letter of the Attorney General of July 31, 1943, *Cong. Rec., supra,* p. 7612, col. 1. The absence of the two essential elements thus negates an agency relation. The facts that the Government is not a party to the action, *Winne* v. *Snow,* 19 Fed. 507 at 508 (D. C., S. D. N. Y., 1884), and that petitioner cannot recoup his expenses from the Government, R. S., §§3491, 3493, fortify this conclusion.

Petitioner, we submit, is the assignee *ex lege* of the Government's claim, subject to a trust of one-half in favor of the Government; *Caswell* v. *Allen,* 10 Johns. (N. Y.) 118 (1813). The major distinctions between trust and agency

are the trustee's title to the trust property, his freedom from control by the *cestui* and his inability to subject the beneficiary to personal liability; *Restatement, Trusts,* §8, Comments (a), (b) and (c). All of the salient features of the False Claims Statute—petitioner's "property in his part of the penalty" (4 *Blackstone Comm.* 399), his "sole control" of the litigation, his position as the sole party plaintiff, his right to recover and collect the statutory damages, forfeiture and costs, his inability to subject the Government to liability for costs—compel the conclusion that, upon commencement of suit, the cause of action is transferred to him, one-half in his own right, the other half in trust for the Government.

But if the relation should be agency, it is coupled with an interest and therefore irrevocable; *Hunt* v. *Rousmanier,* 8 Wheat. (21 U. S.) 174 (1823). The very reasons militating for an assignment indicate at least that the relator "by the bringing of the action hath an *interest* therein" (3 *Coke Inst.* 238) sufficient to render the power irrevocable; *Restatement, Agency,* §§138, 139; and compare Illustrations 1 and 2 of §138.

POINT III

Denial of federal jurisdiction by the 1943 amendment of the False Claims Statute is tantamount to the destruction of petitioner's right itself.

The 1943 amendment purports to affect only the jurisdiction of the district courts which Congress has undisputed power to regulate, Constitution, Art. III, §1; *Lockerty* v. *Phillips,* 319 U. S. 182, at 187-8 (1943). But if petitioner cannot sue in the district courts he cannot sue anywhere. R. S., §3490, provides that the "forfeiture and damages shall be sued for in the same suit". And with respect to "all suits for penalties and forfeitures incurred under the laws of the United States", federal jurisdiction is "exclusive of the courts of the several States";

§256 (2) of the Judicial Code, 28 U. S. C., §371 (2). The abolition of the jurisdiction of the district courts by the 1943 amendment thus leaves petitioner altogether without remedy.

Petitioner's vested right, protected as it is by the Fifth Amendment, cannot be taken by indirection through the complete destruction of the remedy. This is true under the contract clause of the Constitution; *W. B. Worthen Co.* v. *Kavanaugh*, 295 U. S. 56, at 60 (1935); *Richmond M. & L. Co.* v. *Wachovia B. & T. Co.*, 300 U. S. 124, at 128-9 (1937). It is equally true under the due process clauses of the Fourteenth Amendment, *Brinkerhoff-Faris T. & S. Co.* v. *Hill*, 281 U. S. 673, at 679 (1930); *Ettor* v. *Tacoma*, 228 U. S. 148, at 155-6 (1913), and of the Fifth Amendment, *Graham* v. *Goodcell*, 282 U. S. 409, at 430-1 (1931).

POINT IV

The 1943 amendment of the False Claims Statute cannot be sustained on the ground that petitioner may sue for compensation in the Court of Claims.

The Court below assumed, without deciding, that petitioner had a vested right in the cause of action against Anaconda, and that the 1943 amendment effected a "taking" of that right. But the Court held that the taking was not without due process of law. For by its power of eminent domain Congress could, under the Fifth Amendment, take petitioner's property for just compensation. The compensation did not have to be paid in advance of the taking, provided that petitioner was afforded a plain and adequate remedy; *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18, at 21 (1940); *Hurley* v. *Kincaid*, 285 U. S. 95, at 104 (1932). According to the Circuit Court petitioner was given such a remedy; for by taking his property the Government impliedly contracted to pay him just compensation; *U. S.* v. *Lynah*, 188 U. S. 445, at 462, 464, 465 (1903);

and §145 (1) of the Judicial Code, 28 U. S. C., §250,* permits petitioner to enforce the implied contract in the Court of Claims (R. 62).

We submit that the Circuit Court erred on two counts.

A

Congress made no contract to compensate petitioner for the taking of his property

Under the Court of Claims Act, 28 U. S. C., §250 (1), as under the similar Tucker Act, 28 U. S. C., §41 (20), petitioner can sue the United States for compensation only if his claim arises upon a "contract, express or implied, with the Government of the United States". In the absence of a contract the United States is immune from suit, even though petitioner's claim for the taking of his property be "founded upon the Constitution" or be one "for damages, liquidated or unliquidated"; *Schillinger* v. *U. S.*, 155 U. S. 162, at 168-71 (1894); *Basso* v. *U. S.*, 239 U. S. 602 (1916).

To sue the United States in the Court of Claims petitioner would have to rely upon "the contract implied in fact which, in view of the constitutional obligation justly to compensate for property taken by eminent domain, ordinarily arises on a taking of private property by the government pursuant to law"; *Marion & Rye V. R. Co.* v. *U. S.*, 270 U. S. 280, at 283 (1926). But the Government, as will presently be seen, made no implied contract with

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* That section, as far as pertinent, provides:

"The Court of Claims shall have jurisdiction to hear and determine the following matters:

(1) *Claims against United States.* First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty if the United States were suable: Provided, * * *."

petitioner to pay him compensation for the taking of his property.

1. Not every governmental taking of property raises the implied contract to pay compensation. The conditions are stated in *U. S.* v. *Lynah, supra,* 188 U. S., at 465:

> "Whenever in the exercise of its governmental rights (the Government) takes *property the ownership of which it concedes to be in an individual,* it impliedly promises to pay therefor." (Italics supplied.)

The language here italicized reflects law well settled; *Alabama* v. *U. S.,* 282 U. S. 502, at 507 (1931); *U. S.* v. *North American Transp. & Trad. Co.,* 253 U. S. 330, at 333 (1920); *U. S.* v. *Great Falls Mfg. Co.,* 112 U. S. 645, at 656 (1884). The rule was clearly stated in *Tempel* v. *U. S.,* 248 U. S. 121, at 130 (1918):

> "But in the case at bar both the pleadings and the facts found precluded the implication of a promise to pay. For the property applied for the public use is not and was not conceded to be in the plaintiff. • • • The law cannot imply a promise by the Government to pay for a right over, or interest in, land, which right or interest the Government claimed and claims it possessed before it utilized the same. If the Government's claim is unfounded, a property right of plaintiff was violated; but the cause of action therefor, if any, is one sounding in tort; and for such the Tucker Act affords no remedy."

The rule is founded in common sense. Where the Government concedes that the property taken belongs to another, it may be presumed to act under its power of eminent domain; and that power may constitutionally be exercised only upon payment of "just compensation". But the requirement of just compensation is inapplicable where the Government predicates its action on some other right or power. To imply in such case a contract to compensate would be the barest fiction, would impute to the Government an intent to expropriate where it does not even know that it is taking private property, and would

in effect nullify the statutory limitations of the jurisdiction of the Court of Claims.

2. Here not even the Court below "conceded" that petitioner had any property right; much less did Congress. The Committee Reports and the voluminous Congressional debates (*supra*, p. 5) suggest not the faintest awareness of Congress, much less a "concession", that the relators in the suits then pending had vested rights. No constitutional question was ever raised. Congress, it may be inferred, simply assumed that its right to regulate the jurisdiction of the district courts (Constitution, Art. III, §1) sustained the amendment. Such was also the position of the Attorney General who sponsored the amendment; witness the briefs submitted by his office in this case, which deny that petitioner has any vested or property right in the claim against Anaconda. On this theory Congress would indeed have been free to terminate all pending actions, without need to fall back on its power of eminent domain.

To sue in the Court of Claims petitioner would have to plead and prove affirmatively that Congress, when enacting the 1943 amendment, "conceded" that he had a vested right; *Pearson* v. *U. S.*, 267 U. S. 423, at 427 (1925). But from the known facts no such "concession" by Congress can be gathered. Congress intended to eliminate what it thought was merely a hope or expectation of reward. If it turns out that petitioner had a vested or property right, the Government cannot be made a condemnor thereof *in invitum*. The taking of petitioner's property is ineffective because it violates due process of law; and it cannot be cured by invoking the right of eminent domain which Congress did not intend to exercise and the price of which it did not intend to pay.

3. This conclusion is sustained by additional grounds. The contract upon which suit may be brought in the Court of Claims "must be an actual one and, if implied, must be implied in fact, not merely implied by fiction, or as it is said, by law"; *Alabama* v. *U. S.*, *supra*, 282 U. S., at 506.

"The circumstances", it has been held, "may be such as to clearly rebut the existence of an implied contract"; *Klebe* v. *U. S.*, 263 U. S. 188, at 191 (1923); *Atwater & Co.* v. *U. S.*, 275 U. S. 188, at 191 (1927). More particularly, the implication of a contract will be deemed rebutted where the Government, upon taking the property, states that it will not pay therefor; *Ball Engineering Co.* v. *White & Co.*, 250 U. S. 46, at 57 (1919); *Mullen Benev. Co.* v. *U. S.*, 290 U. S. 89, at 95 (1933).

The 1943 amendment of the False Claims Statute was designed to eliminate or reduce the compensation of the *qui tam* plaintiffs. Those who, like petitioner, brought their suits without original information are to receive nothing. Congress so provided by terminating their suits (R. S., §3491C, as amended) and repealing R. S., §3493. An enactment designed to take compensation away cannot be construed as an implied promise to pay it nevertheless.

B

Even if Congress had contracted to compensate petitioner, the taking of his property was invalid since it was not "for public use"

Assuming, for argument's sake, that Congress, in terminating this action, promised to compensate petitioner, the attempted exercise of eminent domain must fail because petitioner's property was not taken *for public use*. That a taking for private use is unauthorized, even though compensation be provided, appears from the clear language of the Fifth Amendment and is well settled; *Missouri Pac. R. Co.* v. *Nebraska*, 164 U. S. 403, at 416-7 (1896); *U. S.* v. *Certain Lands*, 78 F. 2d 684, at 686 (C. C. A. 6, 1935), cert. dism. 297 U. S. 726. And it is equally well settled that "the nature of a use, whether public or private, is ultimately a judicial question"; *Rindge Co.* v. *Los Angeles*, 262 U. S. 700, at 705 (1923).

If the 1943 amendment of the False Claims Statute were permitted to stand, petitioner's share would flow into the general treasury of the United States. While it would

thus become public property, it would not be put to a "public use" within the meaning of the Fifth Amendment. The sole purpose and effect of appropriating private property into the public treasury would be to enrich the treasury. But that is the function of taxation. The mere enrichment of the treasury can never justify the exercise of eminent domain; nor can it be accomplished by this power; for whatever would flow by this means into the treasury would have to be paid out again as "just compensation". The "public use" envisaged by the Fifth Amendment must be a use for a specific and well defined purpose. Otherwise every taking of private property could be sustained on the mere ground that the Government is the recipient; and the limitations which the words "for public use" place upon the power of eminent domain would go into the discard.

It might be said that the 1943 amendment was designed not only to put the relators' shares in pending *qui tam* actions in the public treasury, but also to prevent overzealous informers from embarrassing criminal proceedings brought by the Government (*Cong. Rec.*, 78th Cong., 1st Sess., p. 7572; *Sen. Rep.* No. 291, Part 1). But the prevention of an existing abuse is no substitute for the constitutional requirement that the property taken by eminent domain must be designed for "public use". It is the character of the use to which the property is to be put after its taking which must determine whether or not it was taken for public use. This does not mean that Congress was powerless to prevent the mischievous interference by private suits with criminal prosecutions. But the means was to place appropriate procedural curbs upon those suits (such as a stay until termination of the criminal suits); the chose in action itself could not be taken away under any of the powers conferred upon Congress by the Constitution.

Respectfully submitted,

Moses B. Sherr,
Petitioner pro se.

Dated: September 5, 1945.

APPENDIX A

The False Claims Statute Before the 1943 Amendment

12 Stat. 698; Rev. Stat., §§3490-3494;
31 U. S. C., §§231-235

§3490. Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions,

clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipment, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

§3491. The several district courts of the United States, the supreme court of the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States, the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

§3492. It shall be the duty of the several district attorneys of the United States for the respective districts, for the District of Columbia, and for the several Territories,

to be diligent in inquiring into any violation of the provisions of section 3490 by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of $2,000, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit.

§3493. The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided,* That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States.

§3494. Every such suit shall be commenced within six years from the commission of the act, and not afterward.

APPENDIX B

The 1943 Amendment of the False Claims Statute

Chap. 377, Public Law No. 213, 78th Congress, First Session, 57 Stat. 608-9.

AN ACT

To limit private suits for penalties and damages arising out of frauds against the United States.

BE IT ENACTED by the Senate and the House of Representatives of the United States of America in Congress assembled, That Section 3491 of the Revised Statutes (U. S. C., title 31, sec. 232) be, and it hereby is, amended to read as follows:

§3491 (A) The several district courts of the United States, the District Court of the United States for the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try and determine such suit.

(B) Except as hereinafter provided, such suit may be brought and carried on by any person, as well for himself as for the United States, the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

(C) Whenever any such suit shall be brought by any person under clause (B) notice of the pendency

of such suit shall be given to the United States by serving upon the United States attorney for the district in which such suit shall have been brought a copy of the bill of complaint and by sending, by registered mail, to the Attorney General of the United States at Washington, District of Columbia, a copy of such bill together with a disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of such suit. The United States shall have sixty days, after service as above provided, within which to enter appearance in such suit. If the United States shall fail, or decline in writing to the court, during said period of sixty days to enter any such suit, such person may carry on such suit. If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States. In carrying on such suit the United States shall not be bound by any action taken by the person who brought it, and may proceed in all respects as if it were instituting the suit: *Provided,* That if the United States shall fail to carry on such suit with due diligence within a period of six months from the date of its appearance therein, or within such additional time as the court after notice may allow, such suit may be carried on by the person bringing the same in accordance with clause (B) above. The court shall have no jurisdiction to proceed with any such suit brought under clause (B) or pending suit brought under this section whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought: *Provided, however,* That no abatement shall be had as to a suit pending on December 23, 1943, if before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and informa-

tion which was not theretofore in the possession of the Department of Justice.

(D) In any suit whether or not on appeal pending on December 23, 1943, brought under this section, the court in which such suit is pending shall stay all further proceedings, and shall forthwith cause written notice, by registered mail, to be given the Attorney General that such suit is pending, and the Attorney General shall have sixty days from the date of such notice to appear and carry on such suit in accordance with clause (C).

(E) (1) In any such suit, if carried on by the United States as herein provided, the court may award to the person who brought such suit, out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount which in the judgment of the court is fair and reasonable compensation to such person for disclosure of the information or evidence not in the possession of the United States when such suit was brought. Any such award shall in no event exceed one-tenth of the proceeds of such suit or any settlement thereof.

(2) In any such suit when not carried on by the United States as herein provided, whether heretofore or hereafter brought, the court may award to the person who brought such suit and prosecuted it to final judgment, or to settlement, as provided in clause (B), out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount, not in excess of one-fourth of the proceeds of such suit or any settlement thereof, which in the judgment of the court is fair and reasonable compensation to such person for the collection of any forfeiture and damages; and such person shall be entitled to receive to his own use such reasonable expenses as

the court shall find to have been necessarily incurred and all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided*, That such person shall be liable for all costs incurred by himself in such case and shall have no claim therefor on the United States.

Sec. 2. Section 3493 of the Revised Statutes (U. S. C., title 31, sec. 234) is hereby repealed.

Approved December 23, 1943.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 429

MOSES B. SHERR, PETITIONER

v.

ANACONDA WIRE & CABLE COMPANY AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 47–54) is reported in 57 F. Supp. 106. The opinion of the United States Court of Appeals for the Second Circuit (R. 60–62) is reported in 149 F. 2d 680.

JURISDICTION

The opinion of the Circuit Court of Appeals was entered on May 25, 1945 (R. 60). A petition for rehearing (R. 62) filed by petitioner was denied on June 8, 1945 (R. 68). The judgment

was entered June 16, 1945 (R. 69). The petition for a writ of certiorari was filed on September 13, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the amendment of December 23, 1943 to Rev. Stat. §§ 3490–3493 and 5438, providing that the United States District Courts shall have no jurisdiction to proceed with any *qui tam* suit pending thereunder if based upon information in the possession of the United States at the time the suit was brought, is constitutional as applied to the instant case.

STATUTES INVOLVED

Rev. Stat. §§ 3490–3493 and 5438, as they read prior to the enactment of Pub. L. 213 on December 23, 1943, and Pub. L. 213 are set forth in Appendices A and B, pp. 16–23, *infra*.

STATEMENT

On December 21, 1942, the respondent Anaconda Wire & Cable Company and certain of its officials and employees were indicted by a Federal Grand Jury in the Northern District of Indiana for the commission of certain frauds upon the United States at Anaconda's plant in Marion, Indiana (R. 17). On the next day, December 22, 1942, an account of the indictment appeared in the press (R. 22–25).

The following day, December 23, 1942, petitioner, a private individual, commenced the instant action by filing a complaint (R. 3–6) in the United States District Court for the Southern District of New York under Rev. Stat. § 3491, against Anaconda and the other defendants named in the indictment, to recover damages and forfeitures under Rev. Stat. §§ 3490 and 5438, on account of the commission of specified frauds upon the United States, which in general were the same as the fraudulent practices for which those defendants had been indicted (R. 17).[1] Only Anaconda was served in the instant suit.

On December 23, 1943, Rev. Stat. § 3491 was amended to provide that within 60 days after notice to the United States of the pendency of

[1] Rev. Stat. § 5438 prohibits, under penalty of fine and imprisonment, the making of a false claim against the Government of the United States or otherwise defrauding or attempting to defraud it. Rev. Stat. § 3490 provides that any person who commits such an act "shall forfeit and pay to the United States" $2,000 plus "double the amount of damages" sustained by the United States, with costs, all to be sued for in the same suit. By Rev. Stat. § 3491 as in effect prior to December 23, 1943, "Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States * * *." Rev. Stat. § 3493 prior to December 23, 1943 provided that "The person bringing said suit and prosecuting it to final judgment shall be entitled to receive" one-half the forfeiture and damages "he shall recover and collect," the other half "shall belong to and be paid over to the United States * *. *." (See Appendix A, pp. 16–19, *infra.*)

any *qui tam* suit brought thereunder before or after the amendatory act, the United States may enter an appearance therein and carry on the suit (57 Stat. 608–609, § 3491 (C) and (D)).[2] Pursuant to that provision, the United States was given notice of the instant suit and on March 6, 1944, duly filed an entry of appearance therein.

The amendment of December 23, 1943, also provided that:

> The court shall have no jurisdiction to proceed with any * * * pending [*qui tam*] suit brought under section 3491 of the Revised Statutes whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought: *Provided, however,* That no abatement shall be had as to a suit pending [on December 23, 1943] if before such suit was

[2] The 1943 amendment also repealed Rev. Stat. § 3493 and provided that if the United States carries on the suit, the court "may award to the person who brought such suit, out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount which in the judgment of the court is fair and reasonable compensation to such person for disclosure of the information or evidence not in the possession of the United States when such suit was brought", but not more than $\frac{1}{10}$ of the proceeds or settlement (§ 3491 (E) (1)). If the suit is not carried on by the United States, the court may award an amount, not more than $\frac{1}{4}$ of the proceeds or settlement, "which in the judgment of the court is fair and reasonable compensation to such person for the collection of any forfeiture and damages" (§ 3491 (E) (2)).

> filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice.[3]

Relying upon this provision, the United States filed a motion in the district court for an order determining that petitioner's action was based upon evidence and information in the possession of the United States at the time it was brought and, in the event such a determination was made, for an order staying petitioner's action until final adjudication of the Government's own civil suit which it had instituted shortly before on account of the frauds in question (R. 11–12).[4] At the

[3] The 1943 amendment, as the legislative history reveals, was primarily designed by Congress to terminate the practice then becoming increasingly apparent, whereby third persons having no relationship to the frauds against the Government were racing to file informer's actions based solely upon information derived from newspaper accounts of criminal indictments, antitrust complaints, and the like, without themselves making any contributions by way of disclosure or investigation. H. Rept. No. 263, 78th Cong., 1st Sess.; S. Rept. No. 291, 78th Cong., 1st Sess. For an example of the situation to which the amendment was directed, see *United States* v. *Baker-Lockwood Mfg. Co.*, 138 F. 2d 48 (C. C. A. 8), certiorari granted and decision vacated *sub nom. Nathanson* v. *United States*, 321 U. S. 746, where a *qui tam* plaintiff succeeded in filing a complaint one day after the return of an indictment and two calendar days prior to the filing of a civil suit by the Government in its own behalf.

[4] The Indiana criminal proceedings terminated with the entry of pleas of *nolo contendere* on the part of all defendants therein and the levying of fines against them on June 12, 1943

same time, Anaconda moved to dismiss petitioner's action on the ground that the court had no jurisdiction thereof under the 1943 amendment (R. 28–29). Petitioner moved to strike the United States' entry of appearance in the instant action on the ground that the 1943 amendment authorizing it was unconstitutional, and requested an order permitting him to continue the prosecution of his action (R. 10).

At the hearing of the motions, petitioner conceded that his action was based, not upon any original information, but solely and entirely upon evidence and information already in the possession of the United States, its officers and agents at the time the suit was brought, and that he

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(R. 18). Shortly after the return of the Indiana indictment, however, Anaconda and certain other of its officials were indicted for the commission of similar frauds at its Pawtucket, Rhode Island, plant (R. 17). The Rhode Island proceedings were not terminated until January 18, 1944, when the defendants were convicted after a trial and sentenced (R. 18). The Government did not deem it advisable to bring a civil action of its own to recover for the alleged Indiana frauds until after the termination of both criminal cases (R. 18–19). Accordingly, on May 16, 1944, the United States, after it had completed its investigation of the frauds charged in the Indiana indictment, filed its own civil action, pursuant to Rev. Stat. §§ 3490 and 5438, against Anaconda and its Indiana officials named as defendants in petitioner's suit, seeking forfeitures and damages on account of the frauds which formed the basis of the Indiana indictment (R. 19, 28, 56). A civil action brought by the Government on account of the Pawtucket frauds was filed January 18, 1943, and is also pending in Rhode Island (R. 13).

neither had nor furnished any information concerning the case to the Attorney General prior to bringing the action (R. 35, 49–50). The district court thereupon granted Anaconda's motion to dismiss, holding the 1943 amendment constitutional as applied to petitioner's suit; denied petitioner's motion in its entirety, and denied that part of the motion of the United States which requested a stay of the instant suit (R. 45–47). On appeal by petitioner, the court below affirmed the judgment of the district court (R. 60–62, 69).

ARGUMENT

Petitioner concedes that his suit, which was filed the day following a newspaper account of the defendant's indictment in Indiana, was not based upon any original information (R. 35), and as the court below noted (R. 61) his activities in the case until the Government filed its appearance therein, consisted only of filing a complaint and effecting service thereof on Anaconda alone (R. 17). In these circumstances, petitioner argues that he obtained a vested property or contract right to prosecute his action to final judgment and to receive, if successful, one-half the ultimate recovery as formerly provided in Rev. Stat. § 3493; and that this "right" is constitutionally immune from legislative abridgment. The rejection of this contention by the lower court is so clearly correct that review by this Court is, we

submit, not warranted, particularly in view of the narrow issue involved.

1. The decision below is correct.

(a) The established rule since the dawn of *qui tam* actions more than four centuries ago has been that until the informer recovers judgment, he obtains no vested rights in the suit which are immune to curtailment or termination by the legislature. In the words of Blackstone (*Commentaries,* Vol. 2, (Lewis Ed., 1900) p. 437):

> But there is also a species of property to which a man has not any claim or title whatsoever, till after suit commenced and judgment obtained in a court of law * * * and where, before judgment had, no man can say that he has any absolute property, either in possession or in action. Of this nature are,
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> I. Such penalties as are given by particular statutes, to be recovered in an action *popular* * * *. For by commencing the suit the informer has made the popular action his own private action, and it is not in the power of the crown, *or of anything but parliament,* to release the informer's interest. [Italics supplied.] [5]

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[5] Petitioner's historical references (Pet. 13–16) are all concerned with denying the power of the King, by pardon, release, or compromise, to discharge the defendant in a *qui tam* action from that portion of the recovery which goes to the informer. No authority cited in the petition questions or denies the power of the legislature to modify or terminate *qui tam* actions by amending the authorizing legislation. *Couch* v. *Jeffries*, 4 Burr. 2460, 98 Eng. Rep. 290 (1769),

Consistent with these historical principles, the American authorities universally agree that the institution of a *qui tam* suit does not create any vested right in the plaintiff which is immune to a subsequent legislative modification or repeal of the statute authorizing it. *Bank of St. Mary's* v. *State of Georgia,* 12 Ga. 475 (1853); *Chicago & Alton R. R. Co.* v. *Adler,* 56 Ill. 344, 350 (1870); *Mix* v. *Ill. Cent. R. R. Co.,* 116 Ill. 502 (1886); *Allen* v. *Farrow,* 2 Bailey 584 (S. C. 1831); cf. *Commonwealth* v. *Welch,* 32 Ky. 330 (1834); *United States* v. *Twenty-Five Thousand Gallons of Distilled Spirits,* Fed. Cas. No. 16564 (C. C. S. D. N. Y.), affirming Fed. Cas. No. 14282 (S. D. N. Y.).[6] This accords with the estab-

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cited by petitioner (Pet. 15), involved a question of statutory construction but implies that had Parliament used not "general words" but specific language expressing a plain intent to affect pending *qui tam* actions, the court would have given it effect, even though the plaintiff there had prosecuted his case to a verdict in his favor. See *Coles* v. *County of Madison,* 1 Breese (Ill.) 154 (1826); *Pope* v. *Lewis,* 4 Ala. 487, 491–492 (1842).

The distinction between the legislative and executive power over informer suits has a rational basis. *Qui tam* actions are the result of a declared legislative policy of discovering and redressing public wrongs through the medium of private informer suits; to permit the King to terminate any such suit without the sanction of Parliament would enable the executive to repeal the legislation *pro tanto.*

[6] *United States* v. *Griswold,* 24 Fed. 361 (D. Ore.), affirmed, 30 Fed. 762 (C. C. Ore.), and *McLane* v. *United States,* 6 Pet. 404, relied upon by petitioner (Pet. 16, 20), are inapposite. The former dealt with an attempt by an *executive* to compromise the liability of a defendant against whom

lished rule in the field of legislation providing for the recovery of private penalties by injured persons; and here the cases agree that the institution of suit does not create any vested right against a subsequent legislative modification or repeal of the enabling act. *Norris* v. *Crocker,* 13 How. 429, 439; *State of Maryland* v. *B. & O. R. R. Co.,* 3 How. 534; cf. *Union Iron Co.* v. *Pierce,* Fed Cas. No. 14367 (C. C. D. Ind.); *United States* v. *Morris,* 10 Wheat. 246, 287–292; cf. also *Western Union Tel. Co.* v. *L. & N. R. R. Co.,* 258 U. S. 13, 20.

Against the background of centuries of informer legislation, frequently amended or repealed, the absence of a single decision denying the legislature's right to interfere with pending *qui tam* litigation is eloquent testimony of the legislature's plenary powers in this field. The petitioner seeks to escape the force of this solid body of decisions by attempting to distinguish between a repeal of legislation imposing a penalty, thus indicating a change in the Government's "penal" policy, and an act such as Public Law 213, reducing the informer's rights of recovery, which he characterizes as a "reconveyance" of those rights to the Government (Pet. 19–20). This distinction is unsound, for a "property right" entitled to protec-

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final judgment had been recovered by the *qui tam* plaintiff; the latter involved a question of statutory interpretation resulting in the holding that Congress did not intend a remission of the informer's share in the penalty.

tion against legislative curtailment or destruction, would be invulnerable to either type of statute. Moreover, many of the cases upholding legislative curtailment of the private right to recover a penalty did not involve a change in the "penal policy" of the sovereign since some penalty—often more stringent than that superseded—still attached to the commission of the acts proscribed by the earlier legislation. Cf. *Norris* v. *Crocker,* 14 How. 429; *Parry, qui tam* v. *Croyden Gas Co., Ltd.,* 15 C. P. (n. s.) 568 (1863); *United States* v. *Twenty-five Thousand Gallons of Distilled Spirits,* Fed. Cas. No. 14282 (S. D. N. Y.), affirmed Fed. Cas. No. 16564 (C. C. S. D. N. Y.); *Mix* v. *Ill. Cent. R. R. Co.,* 116 Ill. 502; *Bank of St. Mary's* v. *Georgia,* 12 Ga. 475; *Nichols* v. *Squire,* 22 Mass. (5 Pick.) 168; *Chicago & Alton R. R. Co.* v. *Adler,* 56 Ill. 344.

(b) Petitioner's contention that the institution of a *qui tam* action gives rise to a contract right against the sovereign (Pet. 20–25) is likewise contradicted by the unanimous body of American authorities. *Atwood* v. *Buckingham,* 78 Conn. 423; *Bank of St. Mary's* v. *State of Georgia,* 12 Ga. 475; *Coles* v. *County of Madison,* 1 Breese (Ill.) 154; *Cushman* v. *Hale,* 68 Vt. 444. The statute under which petitioner asserts his "contract right", Rev. Stat. §§ 3491–3493 prior to the 1943 amendment, makes it clear that the informer's rights are limited to sharing in the judgment when and if one is recovered. In the

language of Congress, "The person bringing said suit *and prosecuting it to final judgment* shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall *recover and collect*" (§ 3493). [Italics supplied.] There was plainly no undertaking by the United States to pay or secure anything to the informer upon his bringing suit, or to do any other act; prior to recovery and collection by the plaintiff in the *qui tam* suit, he has nothing but an expectancy, contingent upon the fulfillment of the statutory provisions. Even after judgment, he would not be entitled to receive anything from the United States, but only the statutory moiety of the sum collected from the defendant. See *United States* v. *Griswold*, 24 Fed. 361, 365 (D. Ore.), affirmed, 30 Fed. 762 (C. C. D. Ore.).

The absence of any contractual relationship between the plaintiff and the Government, such as would inhibit legislative curtailment of the suit, is underscored by the fact that a *qui tam* plaintiff assumes no obligation when he institutes suit; indeed, there is no way to compel him to continue his suit to final judgment, or to recover damages for refusal to do so.[7]

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[7] Petitioner's claimed affirmative duty to continue his *qui tam* suit to final judgment (Pet. 20–21) is wholly illusory. The provision that a *qui tam* suit is not to be withdrawn nor discontinued without consent of the District Attorney and court in which the action was filed (R. S. § 3491) is merely

(c) Finally, as was suggested in the *per curiam* opinion below (R. 61–62), if petitioner has any vested rights which have been impaired by Public Law No. 213, it is not to be assumed that he is without a remedy. Assuming, as petitioner contends (Pet. 20), that he has a contract with the United States similar to an agreement to perform legal services, he may maintain a suit in the Court of Claims for its breach. 28 U. S. C. § 250.[8] Moreover, if petitioner has a property right in the action that is protected by the Fifth Amendment, and if Public Law No. 213 constitutes a taking of that right by the Government for which compensation is constitutionally required, as he asserts is the case (Pet. 13), the resultant taking would support a suit for compensation in the Court of Claims. *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18, 20–23; *Hurley* v. *Kincaid*, 285 U. S. 95, 104, 105. Accordingly, Public Law No. 213, which withdrew jurisdiction from the district courts over informer suits of this type, falls

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designed to eliminate the possibility of collusion between a *qui tam* plaintiff and the defendant, and goes no further than Rule 23 (c) of the Federal Rules of Civil Procedure providing that class suits are not to be dismissed or compromised without the approval of the court. *Russell* v. *Sebastian*, 233 U. S. 195, cited by petitioner as authority for the proposition that a contract exists, is inapposite. It deals, as is shown by the authorities cited (*Id.* p. 204) with the rights of a public utility under a franchise.

[8] The right to revoke such a contract and to relegate the attorney to a *quantum meruit* claim is established. *In re Paschal*, 10 Wall. 483, 496.

well within the constitutional authority of Congress to withhold or withdraw jurisdiction from the district courts over designated classes of controversies. *Lockerty* v. *Phillips*, 319 U. S. 182, 187–188, 189; *United States* v. *Union Pacific R. R. Co.*, 98 U. S. 569, 603; *Bank of Columbia* v. *Okely*, 4 Wheat. 235, 245; cf. *Lynch* v. *United States*, 292 U. S. 571, 582.

2. The issue involved here is raised in only two pending suits.[9] Moreover, there is no conflict. The constitutionality of the abatement provisions of Public Law No. 213, which applies to *qui tam* plaintiffs such as petitioner who have furnished no new evidence or information to the Government, has been upheld by every court which has had occasion to consider its validity. *U. S. ex rel. McLaughlin* v. *Am. Chain & Cable Co.*, Civil No. 20–252 (S. D. N. Y., April 18, 1945); *U. S. ex rel.*

[9] Contrary to petitioner's assertion (Pet. 10), the decision below does not affect 250 pending *qui tam* actions. The files of the Department of Justice, which may be taken accurately to reflect the situation (see Sec. 3491 (D) of Public Law No. 213) reveal that 51 *qui tam* actions were pending when the amendment was enacted; that all but 18 of these have been finally disposed of; and that in only 2 of the 18 is an issue raised as to the constitutionality of Public Law No. 213. *United States ex rel. Bayarsky* v. *Brooks* and *United States ex rel. Hewitt* v. *Pittman*, now pending on appeals by the United States in the Second and Fifth Circuits, involve the statutory interpretation and not the constitutionality of Public Law No. 213. There the abatement of the informer suits, on the defendant's motion, was over the objection of the United States, which did not have an independent suit pending.

Nitkey v. *Dawes,* No. 43C574 (N. D. Ill., Dec. 18, 1944); *U. S. ex rel. Nathanson* v. *Baker-Lockwood Mfg. Co.,* No. 1407 (W. D. Mo., June 20, 1944); *U. S. ex rel. Ryan* v. *Broderick,* No. 4806 (D. Kan., April 27, 1944); cf. *U. S. ex rel Rodriguez* v. *Weekly Publications, Inc.,* 144 F. 2d 186 (C. C. A. 2), affirming 54 F. Supp. 476 (S. D. N. Y.).

CONCLUSION

The decision below is correct and no conflict exists. We respectfully submit that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.

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OCTOBER, 1945.

APPENDIX A

Sections 3490–3493 of the Revised Statutes (12 Stat. 696, 31 U. S. C., Sections 231–234) read as follows prior to the enactment of Public Law 213 on December 23, 1943:

> SEC. 3490. Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "CRIMES," shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.
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> SEC. 3491. The several district courts of the United States, the Supreme Court of the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of

the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

SEC. 3492. It shall be the duty of the several district attorneys of the United States for the respective districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of section thirty-four hundred and ninety by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of two thousand dollars, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit.

SEC. 3493. The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided,* That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States.

Section 5438 of the Revised Statutes, 12 Stat. 696, reads as follows:

> SEC. 5438. Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who

makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars.

APPENDIX B

Public Law 213, 78th Congress, 1st Session, approved December 23, 1943, 57 Stat. 608, reads as follows:

AN ACT To limit private suits for penalties and damages arising out of frauds against the United States

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3491 of the Revised Statutes (U. S. C., title 31, sec. 232) be, and it hereby is, amended to read as follows:

SEC. 3491 (A). The several district courts of the United States, the District Court of the United States for the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit.

(B) Except as hereinafter provided, such suit may be brought and carried on by any person, as well for himself as for the United States, the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

(C) Whenever any such suit shall be brought by any person under clause (B)

notice of the pendency of such suit shall be given to the United States by serving upon the United States attorney for the district in which such suit shall have been brought a copy of the bill of complaint and by sending, by registered mail, to the Attorney General of the United States at Washington, District of Columbia, a copy of such bill together with a disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of such suit. The United States shall have sixty days, after service as above provided, within which to enter appearance in such suit. If the United States shall fail, or decline in writing to the court, during said period of sixty days to enter any such suit, such person may carry on such suit. If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States. In carrying on such suit the United States shall not be bound by any action taken by the person who brought it, and may proceed in all respects as if it were instituting the suit: *Provided,* That if the United States shall fail to carry on such suit with due diligence within a period of six months from the date of its appearance therein, or within such additional time as the court after notice may allow, such suit may be carried on by the person bringing the same in accordance with clause (B) above. The court shall have no jurisdiction to proceed with any such suit brought under clause (B) or pending suit brought under section 3491 of the Revised Statutes whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States,

or any agency, officer or employee thereof, at the time such suit was brought: *Provided, however,* That no abatement shall be had as to a suit pending at the effective date of this Act if before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice.

(D) In any suit whether or not on appeal pending at the effective date of this Act brought under Revised Statutes, section 3491, the court in which such suit is pending shall stay all further proceedings, and shall forthwith cause written notice, by registered mail, to be given the Attorney General that such suit is pending, and the Attorney General shall have sixty days from the date of such notice to appear and carry on such suit in accordance with clause (C).

(E) (1) In any such suit, if carried on by the United States as herein provided, the court may award to the person who brought such suit, out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount which in the judgment of the court is fair and reasonable compensation to such person for disclosure of the information or evidence not in the possession of the United States when such suit was brought. Any such award shall in no event exceed one-tenth of the proceeds of such suit or any settlement thereof.

(2) In any such suit when not carried on by the United States as herein provided, whether heretofore or hereafter brought, the court may award to the person who

brought such suit and prosecuted it to final judgment, or to settlement, as provided in clause (B), out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount, not in excess of one-fourth of the proceeds of such suit or any settlement thereof, which in the judgment of the court is fair and reasonable compensation to such person for the collection of any forfeiture and damages; and such person shall be entitled to receive to his own use such reasonable expenses as the court shall find to have been necessarily incurred and all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided,* That such person shall be liable for all costs incurred by himself in such case and shall have no claim therefor on the United States.

SEC. 2. Section 3493 of the Revised Statutes (U. S. C., title 31, sec. 234) is hereby repealed.

U. S. GOVERNMENT PRINTING OFFICE: 1949

IN THE

Supreme Court of the United States

October Term 1945

No. 429

MOSES B. SHERR,

Petitioner,

against

ANACONDA WIRE & CABLE COMPANY and
UNITED STATES OF AMERICA,

Respondents.

BRIEF FOR ANACONDA WIRE & CABLE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

HORACE G. HITCHCOCK,
Counsel for Respondent.

DWIGHT R. COLLIN,
of Counsel.

INDEX

Cases Cited

Other Authorities Cited

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Opinions Below

The opinion of the United States District Court for the Southern District of New York (R. 47-54) is reported in 57 Federal Supplement, 106. The *per curiam* opinion of the Circuit Court of Appeals for the Second Circuit (R. 60-62) and the concurring opinion of Circuit Judge Clark (R. 62) are reported in 149 Federal Reporter, (2d), 680.

Statement

The action was instituted as the result of publicity given to an indictment secured by the Department of Jus-

tice against the respondent Company and others and is founded upon information secured by activities of the Department of Justice, in the course of which the appellant took no part.

The statute under which the action was brought was amended December 23, 1943. On March 4, 1944, the Attorney General filed a notice of appearance in this action. Thereafter, by notice of motion dated April 3, 1944, appellant moved to strike the notice of appearance filed by the Attorney General and for permission to prosecute the action.

On May 16, 1944, the Attorney General moved to stay the action pending the determination of another action for the same relief instituted by the United States. In the same motion the Attorney General moved for an order declaring that the action was based upon evidence or information in the possession of the United States or agencies, officers or employees thereof at the time it was brought, basing the latter motion upon an affidavit of the Honorable Francis M. Shea, Assistant Attorney General (R. 14-21).

Respondent Anaconda Wire & Cable Company, by motion dated May 20, 1944, moved to dismiss the action upon the ground that the Court was without jurisdiction, it appearing that the action was founded upon information in the possession of the Department of Justice at the time the action was commenced and that, therefore, under the provisions of the amended statute, the Court could not proceed further with the case.

The motions of petitioner and the respondents came on to be heard together before Judge Leibell on June 2, 1944, and were decided together, with an opinion (140-162).

The District Court granted the motion of the respondent Anaconda Wire & Cable Co. to dismiss the action and the motion of the Attorney General to declare that the action was founded upon information in the possession of the United States; it denied the motion to strike the appearance of the United States and the motion to stay the action. The Court of Appeals for the Second Circuit affirmed.

Petitioner concedes that, under the provisions of the statute, as amended, the District Court was required to dismiss this action, but seeks to raise a constitutional question as to the effect of the amendment on pending suits.

Petitioner thus does not challenge the constitutionality of the amendment as a whole but merely that portion withdrawing the jurisdiction of the District Courts in pending actions based upon evidence or information in the possession of the United States at the time of their commencement.

Any suggestion (Petition, pp. 10 and 11) that this petition raises any broad question as to the constitutionality of the amendment would be without foundation.

In *Marcus* v. *Hess,* 317 U. S. 537, the Attorney General unsuccessfully urged upon this Court that non-informing relators, such as the relator in the present case, were not entitled to institute such actions upon the basis of information discovered by agencies of the Government. The Court rejected this argument, stating "The trouble with these arguments is that they are addressed to the wrong forum" (317 U. S. 547). Thereafter, the arguments were addressed to Congress and Congress took cognizance of the situation and passed Public Law No. 213, of the 78th Con-

gress, approved December 23, 1943. Under the provisions of the amended statute, the jurisdiction of the District Court was withdrawn in actions such as the present one, which were commenced upon information in the possession of the United States and as to other actions, which were permitted to continue, the Attorney General was given broad power to intervene and direct the prosecution of such actions. The purpose of the legislation was remedial and designed to do away with a growing abuse, which was calculated to interfere with the functioning of the Department of Justice.

Questions Presented

The sole question here is whether the Fifth Amendment to the Constitution forbade Congress to withdraw the jurisdiction of the District Courts in pending actions begun by non-informing relators to recover damages accruing to the United States where the basis of the action was information and evidence secured by the United States independently of such persons. No other question is or can be raised by this petitioner.

The decision of this question would involve only a limited question as to the constitutionality of the amendment affecting a few pending cases. On the grounds urged by petitioner, a review of the constitutionality of the statute could not determine the effect of the statute upon actions which may be brought in the future under a different provision of the statute.

There is no conflict between the decision below and the decisions of this Court or of other Circuit Courts of Appeal.

There is no peculiar or original question involved which is not already controlled by existing decisions of this Court. The question propounded by the petitioner is not novel. It was not reserved in *Nathanson* v. *U. S.*, 321 U. S. 746, as suggested by petitioner, so far as appears from any language of this Court, and this question has been repeatedly answered in the negative by this Court and by the courts of the various states. There is no authority to support such a proposition and there is a long unbroken line of authorities against it.

Reasons for Denying the Writ

The institution of a *qui tam* action *per se* creates no rights in the *qui tam* plaintiff merely by reason of the institution of the action.

The False Claims Statute before amendment was a procedural or remedial statute which afforded an opportunity to informers to earn a reward by prosecuting an action successfully to judgment.

Such a statute afforded no basis for any claim of contract between the Sovereign and one availing himself of the opportunity under the statute which would estop the Sovereign from amending or repealing the statute so as to withdraw the opportunity.

A vested property right, if any, could arise only upon the entry of a judgment in favor of the *qui tam* plaintiff and the right would then be only in the judgment, not in the statute. Until that time, relator's interest was an inchoate expectancy dependent upon the statute and subject to whatever changes the legislature might make in the statute.

An offer of a reward or an offer of a bounty would create no contract between the offerer and one who took steps to earn the reward or bounty but had not yet performed, even if the offerer were a private person.

As Circuit Judge Clark pointed out (R. 62), the statute afforded no basis for a contract between the petitioner and the Sovereign. It was only a method of law enforcement by private individuals under the stimulus of a reward for successful accomplishment, but with nothing to prevent the Sovereign from resuming enforcement itself before the reward had been earned.

The Sovereign could repeal the statute and put an end to the jurisdiction of the District Court without any possibility of estoppel.

There could be no vested right in the statute nor any power to compel specific performance of a contract to act as plaintiff to earn a reward. The statute had for its purpose the protection of the people of the United States and not the creation of private rights and the Congress had paramount power to amend or repeal.

Any question of compensation, if there were any incidental or collateral private right created, cannot affect or impair the power of the Sovereign to repeal or amend the statute and no constitutional question can be raised thereby with respect to the amendment.

Petitioner wholly fails to meet the test of the uniform rule laid down "by an unbroken line of decisions, from Chief Justice Marshall to the present day • • • that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt" (*Adkins* v. *Children's Hospital*, 261 U. S. 525).

POINT I

A *qui tam* plaintiff under the false claims statute acquired no vested or property right by the commencement of the action.

The institution of a *qui tam* action created no vested right in the relator and the amendment or repeal of the statute is as effective with respect to pending actions as it is with respect to claims upon which no action has been brought. (*Norris* v. *Crocker,* 13 How. 429; *Maryland* v. *B. & O. R. R.,* 3 How. 534; *Gulf, Colorado & Santa Fe R. R.* v. *Dennis,* 224 U. S. 503; *Yeaton* v. *U. S.,* 5 Cranch. 281; *Flanigan* v. *Sierra County,* 196 U. S. 553; *U. S.* v. *Connor,* 138 U S. 61; *Bank of St. Mary's* v. *State of Georgia,* 12 Ga. 475; *Cushman* v. *Hale,* 68 Vt. 444; 35 Atl. 382; *Mix* v. *Illinois Central R.R. Co.,* 116 Ill. 502; *Commonwealth* v. *Welch,* 32 Ky. 330.)

In *Norris* v. *Crocker,* 13 How. 429, the action was to recover the statutory penalty for harboring a runaway slave. The statute was repealed during the pendency of the action. This Court said:

> "As the plaintiff's right to recover depended entirely on the statute, its repeal deprived the court of jurisdiction over the subject-matter. And in the next place, as the plaintiff had no vested right in the penalty, the legislature might discharge the defendant by repealing the law."

In *Flanigan* v. *Sierra County,* 196 U. S. 553, the action was to collect a business license fee which accrued to a county under a statute. The statute was repealed during the pendency of the action. The action related to a period during which the license statute was in effect. This Court

held that the repeal of the statute repealed the power to collect licenses accruing even during its life, quoting with approval from *City of Sonora* v. *Curtin,* 137 California 583, as follows:

> "In speaking of the rule as to enforcements of rights under repealed statutes, Endlich on the Interpretation of Statutes [sec. 480], says: 'The same rule applies to rights and remedies founded solely upon statute, and to suits pending to enforce such remedies. If at the time the statute is repealed, the remedy has not been perfected or the right has not become vested, but still remains executory, they are gone.' " (196 U. S. 553, at p. 561)

The decisions of the state courts are unanimous in holding that the commencement of a *qui tam* action creates no vested right in the informer. *Bank of St. Mary's* v. *State of Georgia,* 12 Ga. 475; *Cushman* v. *Hale,* 68 Vt. 444; *Allen* v. *Farrow,* 2 Bailey, 584 (S. C., 1831); *Coles* v. *Madison County,* 1 Breese 115 (Illinois, 1826); *State* v. *Tombeckbee Bank,* 1 Stew. 347 (Alabama, 1828); *Commonwealth* v. *Welch,* 2 Dana 330 (Kentucky, 1834).

In *Allen* v. *Farrow,* 2 Bailey 584 (S. C., 1831), the action was under a *qui tam* statute providing treble damages for the taking of usurious interest "one half to the use of the State 'and the other half to him or them, that will inform and sue for the same.' " During the pendency of the action, the statute was repealed. The argument for the plaintiff was in almost the identical words advanced by the relator in the present case. Plaintiff's counsel stated:

> "A *qui tam* action is founded upon an implied contract, the benefit of which vests in the plaintiff by the commencement of the suit, and cannot be divested

without his consent. 3 Bl. Com., 160-1. And the contract in cases of this character, must, like all other contracts, take effect according to the law at the time when it was entered into. * * * The state may unquestionably release its own claims, but if it has transferred them to another, it has lost control over them. The plaintiff has given a consideration for the forfeiture, by incurring the costs of this action; and the State cannot violate its contract with him, by subsequently releasing the forfeiture."

The Court held that the repeal of the statute outlawed the action, stating:

"The plaintiff's counsel have relied on the ground, that as soon as the offence was committed, and proceedings were instituted for the recovery of the penalty, a right vested in the plaintiff, which the Legislature could not take away by the act of 1830. I cannot admit the correctness of this proposition. The farthest that the argument can be legitimately extended, would be, that an inchoate, or imperfect, interest commenced. The right itself had not vested, nor do I conceive that it could vest, until the money was received. Up to that time, it was under the control of the law. It is a power delegated by law, as I conceive, to sue for the use of the State, and for himself; and the same authority, which delegated that power, could revoke it at any time before its final execution." * * *

"The deduction to be drawn from all these cases, I think is, that the statute, under which the penalty is sought to be recovered, must be of force at the rendition of the judgment: and if this be the true principle, it follows necessarily, that if there be no law, the Court can render no judgment. And this view is further illustrated by the well established practice, that a declaration for a penalty, given by stat-

> ute, must conclude 'against the form of the statute;' 1 Gallison, 26, 2 East, 333: and at the trial the question presented is the existence of such a statute. If there be none, the Court can have no authority for its judgment."

Similarly, in *Coles* v. *Madison County,* 1 Breese, 115 (Illinois, 1826), the Supreme Court of Illinois held that a county might not recover a penalty for bringing slaves into the state without giving bond upon their liberation when judgment was not entered upon its claim prior to the repeal of the statute imposing the penalty. The Court rejected the claim that the repealing statute was an *ex post facto* law. In discussing the claim of the County, similar to the claim asserted by the relator here of a vested property right, it stated:

> "It is said that the king cannot remit an informer's interest in a popular action after suit brought; this is no doubt true, but it is equally true, that the parliament can. It is not pretended that the executive could remit the penalty in this case, but that the legislature may. * * * But 'it is not in doubtful cases, or upon slight implications, that the court should pronounce the legislature to have transcended their powers.' In the present case, I am clearly of opinion, they have not done so. The law under consideration is not an *ex post facto* law, because the generally received, and well settled import of the term, is not applicable to a law of this character. It impairs the obligation of no contract, for the conclusive reason that no contract ever existed, and for the same reason, it cannot be said to destroy a vested right."

In *Bank of St. Mary's* v. *State of Georgia,* 12 Ga. 475, Judge Lumpkin stated the rule as follows:

> "We are clear, both upon principles and precedent, that a penalty cannot be recovered, after the expiration of the law which imposes it, either by its own limitation, or a repeal by the power which enacted it, without an express provision to that effect, in the repealing Statute; and that it makes no difference whether the penalty, when recovered, goes entirely to the public or to the informer, or whether, as in this case, it is divided between them." (p. 481)

and (pp. 494-495):

> "We fully and unanimously concur then, in the following conclusions: that the authorities cited, abundantly sustain the position, that an informer who *commences* suit under a penal Statute, does not acquire thereby a *vested right;* * * * and that it is perfectly within the legislative competency to pass such repealing Statutes before *final judgment.*"

In *Cushman* v. *Hale,* 68 Vt. 444, 35 Atl. 382, the informers' statute was repealed after conviction and sentencing and while the fines imposed were being appealed. The Court held that the repeal of the statute granting one fourth of the fines to the prosecuting officer deprived him of any right in the amounts collected after the repeal of the statute upon the basis of the conviction obtained before its repeal.

As to whether a statute creates a contract right, this Court considered the question in *Welch* v. *Cook,* 97 U. S. 541 (1878), where was held that an act of exempting from general taxes for ten years any property used in the District of Columbia for manufacturing purposes created no vested rights. This the Court said:

> "does not create a contract in the sense that it can not be repealed. * * * The exemption of manu-

> facturing property * * * was a bounty merely revocable at any time by the legislature." (pp. 542-543)
>
> "Nor are we able to see that this action involves a breach of faith towards the owner of the manufacturing property. Conceding, as the plaintiff must and does, that the exemption of his property was of the bounty of the legislature, he knew when he accepted it that it was liable to be revoked whenever either the local legislature or Congress should be of the opinion that the public interests demanded such action." (p. 545)

It is settled law that no estoppel runs against the sovereign which will prevent it from withdrawing a proferred bounty at any time.

As a matter of fact, the so-called "bounty cases" would seem to present stronger equities in favor of those plaintiffs than of this one, since in most instances the plaintiffs expended substantial sums in expectation of profiting by the statutory bounty. The cases are uniform in holding that such statutes may be repealed at any time prior to actual payment without incurring liability to the claimants.

In *Salt Company* v. *East Saginaw,* 13 Wall 373 (1871), a Michigan statute offered a bounty for every bushel of salt manufactured from water obtained by boring in the state by persons or corporations engaged in manufacturing salt and exempted from taxation property so used.

Plaintiff sought to enjoin the levy of a tax on its real estate upon repeal of the bounty law contending that the exemption from taxation was a vested right. This Court held that the original act was

"a bounty law, and nothing more; a law dictated by public policy and the general good, * * * Such a law is not a contract except to bestow the promised bounty upon those who earn it, so long as the law remains unrepealed." (p. 377)

"In short, the law does not, in our judgment, belong to that class of laws which can be denominated contracts, except so far as they have been actually executed and complied with. There is no stipulation, express or implied, that it shall not be repealed. General encouragements, held out to all persons indiscriminately, to engage in a particular trade or manufacture, whether such encouragement be in the shape of bounties or drawbacks, or other advantage, are always under the legislative control, and may be discontinued at any time." (p. 379)

Petitioner seeks to distinguish the *Salt Company* case by the argument that the Salt Company upon the repeal of the tax exemption which was supposedly its incentive to manufacture salt could discontinue its operations. The relator argues that having commenced his suit he was committed to carry it to judgment and that, hence, it cannot now be argued that his relationship, if any, to the United States was terminable at the will of either of the parties.

Relator's argument is based upon the provision of the original false claim statute that an informer commencing an action could not thereafter withdraw or discontinue without the consent of the court. However, this did not commit a relator to carry an action on to judgment. It was presumably designed to prevent misuse of the statute for purposes of extortion. After an action had been instituted, a *qui tam* plaintiff cannot be compelled to prosecute it. Anyway, if he were so obligated, the amendment to the

statute of which he complains terminated the obligation and relieved him of any further responsibility.

See also *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S. 379 (1903).

Vail v. *Denver Building and Construction Trades Council*, 108 Col. 206; 115 Pac. 2d 389 (1941).

To support his claim of a vested right, petitioner quotes from the Year Books and from Coke and Blackstone to the effect that upon the commencement of a *qui tam* action the King may no longer discharge the whole penalty. The answer to this contention is as the Court stated in *Coles* v. *Madison County*, 1 Breese 115: "It is said that the King cannot remit an informer's interest in a popular action after suit brought; this is no doubt true, but it is equally true that the parliament can." This distinction between the powers of the executive branch of the Government and the legislative branch is stated in Blackstone as follows (2 Blackstone 436 [Ch. 29, Wendell's Edition 1847]):

> "He obtains an inchoate imperfect degree of property by commencing his suit; but it is not consummated till judgment; for, if any collusion appears, he loses the priority he has gained. But, otherwise, the right so attaches in the first informer, that the king (who, before action brought, may grant a pardon which shall be a bar to all the world) can not, after suit commenced, remit any thing but his own part of the penalty. For, by commencing the suit, the informer has made the popular action his own private action, and it is not in the power of the crown, *or of any thing but Parliament*, to release the informer's interest. This, therefore, is one instance where a suit and judgment at law are not only the means of recovering, but also of acquiring property." (Italics ours.)

In accord: Bacon's Abridgement, Vol. 1, p. 88 (Wilson Edition, 1851).

The decision in *Couch* v. *Jefferies*, 4 Burr. 2460, was cited by the claimant in *Coles* v. *Madison County*, 1 Breese 115, and disposed of by the Court there as follows:

> "In the case of *Couch qui tam* v. *Jeffries* (4 Burrow 2460), Lord Mansfield placed his opinion on the intention of the legislature, which he believed, was not to do injustice to the plaintiff, by subjecting him to costs. So, too, in *Dash* v. *Van Kleeck*, 7 Johns. 577, the same ground was assumed. The court did not intend to decide that the legislature could not pass a retrospective law, but that the one under consideration was not necessarily retrospective, and therefore ought not to receive that construction."

There is no room to question the intent of Congress in the statute under consideration here and petitioner admits there is no question of construction involved.

In taking this step, Congress closely followed what parliament had found necessary some three hundred years before, when by statute of 21 Jac. Ch. 4, it decreed that "information &c. upon penal statutes are to be heard and determined in their proper counties and not in the courts at Westminster, whereby the vexatious swarm of informers who are best trusted where they are least known are vanished and turned again to their former occupations" (Coke's Institutes, Park 4, p. 76).

United States v. *Griswold*, 24 F. 316, stands merely for the proposition that once judgment has been entered in a *qui tam* action, the plaintiff becomes entitled to a specific portion thereof and his right to collect that specific sum may not be abridged. There judgment had been rendered

against the defendant for some $23,000. The Court held that the judgment in which the relator had a half interest could not be compromised by the United States Treasury. The substance of the court's holding appears in the following language (30 Fed. 762):

> "His [the relator's] right of property in this part of the judgment, and his one-half of the judgment recovered for forfeiture and damages, was as absolute, and perfect, *after he had performed all the statutory conditions*, as his right to any other piece of property could possibly be. * * *" (p. 763) (Italics supplied)

Plaintiff's claim of a vested right is irreconcilable with the paramount right of the United States itself to proceed in actions of this type. This right was recognized before the amendment to the statute.

United States v. *Baker-Lockwood Mfg. Co.*, 138 F. (2d) 48 (C. C. A. 8th, 1943), the district court had refused to stay the prosecution of a *qui tam* action pending the trial of an action subsequently begun by the Government upon the same facts. The Circuit Court of Appeals, in reversing the decision of the district court, held that the protection of the public interest could not be made to depend "upon the outcome of 'the miserable race' to the court house," and, in reversing the order of the district court and directing that the actions brought by the two relators be stayed, held "that in the circumstances disclosed by the record before us the United States is entitled to precedence in the trial of a civil action over those actions brought by the informers." The relators petitioned for certiorari to the Supreme Court and, in the interim, the amendatory

statute became effective. The Supreme Court remanded the case to the District Court:

> "• • • with directions to proceed in conformity with the Act of December 23, 1943 • • • but without prejudice to the consideration of any questions which petitioner may have to raise as to the validity or application of that Act." *Nathanson* v. *United States,* 321 U. S. 746-747 (1944).

Petitioner cites *Russell* v. *Sebastian,* 233 U. S. 195 (1914) from which it appears that Section 19 of Art. XI of the California Constitution granted permission to any corporation incorporated for the purpose to use the public streets of any municipality having no comparable public works for the purpose of laying pipes to furnish water and light to the municipality and to its inhabitants.

In 1911, Section 19 of Art. XI of the California Constitution was repealed. The City of Los Angeles forbade a lighting company which already had extensive facilities and many customers to extend its facilities through new streets without first acquiring an express grant from the municipal authorities.

This Court held:

> "It cannot reasonably be contended that the relator is obliged to apply for a new grant whenever a new street is opened or an old one extended, as would be the case if the consent applied only to the situation existing when made. *When the right to use the streets has been once granted in general terms to a corporation engaged in supplying gas for public and private use, such grant necessarily contemplates that new streets are to be opened and old ones extended from time to time, and so the*

privilege may be exercised in the new streets as well as in the old." (pp. 209-210) (Italics ours.)

The *Russell* case affords no analogy. In the *Russell* case, the lighting company was acting not as agent for the state nor for any other agency, but had acquired a grant from the state. The Court construed the original grant as including the use of all of the streets in the municipality, both those in existence at the time of the grant and those subsequently opened, so that the lighting company's rights became vested when it satisfied the requirements of the original constitutional provision and the holding is merely that such property rights could not be subsequently affected.

POINT II

No contract between petitioner and the United States arose out of the commencement of this action.

Sherr began this action, in haste, immediately upon learning of his opportunity from the newspapers, in the hope of an ultimate gain. It was obvious however at that time from the plain language of the then provisions of Section 3493 of the Revised Statutes that he could not realize any gain unless he prosecuted the action to final judgment and enforced the judgment.

Although the Statute was construed in *Marcus* v. *Hess* to afford a person who was not an informer to prosecute an action under the statute, no inducement was ever found in the language of the statute itself, or as construed by the courts, which suggests any reward or inducement for the mere commencement of an action. No compensation was offered to anyone. Those who successfully prosecuted

claims which were reduced to judgment could collect and retain one half the forfeiture and damages. Section 3493 of the Revised Statutes explicitly provided that the informer's share was one half of the forfeiture and damages "he shall recover and collect." No other reward or inducement was held out.

Assuming *arguendo* that this statute constituted an offer (which it did not), the offer was not accepted.

Petitioner cites Williston on Contracts (§§60-60A) and the Restatement of Contracts (§§31, 45) in support of a proposition that an offer of a unilateral contract becomes irrevocable after substantial performance where full performance is assured. The texts cited by petitioner do not fully support this and the cases are against it. In *Petterson* v. *Pattberg*, 248 N. Y. 86, the rule was stated as follows:

> "The act requested to be done, in consideration of the offered promise, was payment in full of the reduced principal of the debt prior to the due date thereof. 'If an act is requested, that very act and no other must be given.' (Williston on Contracts, sec. 73.) 'In case of offers for a consideration, the performance of the consideration is always deemed a condition.' (Langdell's Summary of the Law of Contracts, sec. 4.) It is elementary that any offer to enter into a unilateral contract may be withdrawn before the act requested to be done has been performed. (Williston on Contracts, sec. 60; Langdell's Summary, sec. 4; *Offord* v. *Davies*, 12 C. B. [N.S.] 748.) A bidder at a sheriff's sale may revoke his bid at any time before the property is struck down to him. (*Fisher* v. *Seltzer*, 23 Penn. St. 308.) The offer of a reward in consideration of an act to be performed is revocable before the very act requested has been done. (*Shuey* v. *United States*, 92 U. S. 73; *Biggers* v. *Owen*, 79 Ga. 658; *Fitch* v. *Snedaker*,

> 38 N. Y. 248.) So, also, an offer to pay a broker commissions, upon a sale of land for the offeror, is revocable at any time before the land is sold, although prior to revocation the broker performs services in an effort to effectuate a sale (*Stensgaard* v. *Smith,* 43 Minn. 11; *Smith* v. *Cauthen,* 98 Miss. 746)."

Petitioner does not meet the test laid down by the most liberal text cited, viz. §45 of the Restatement of Contracts:

> "1. A says to B, 'I will not ask you to promise to instal an intra-mural telephone system which will work perfectly in my building, but if you care to try to do it, I will pay you $1000 if you succeed.' B begins the work. When it is partly finished, A revokes his offer. If B can prove that he would have complied with the terms of the offer, he has a right to damages—the contract price less the cost of completing the installation. If B cannot prove that he would have fulfilled the conditions of the offer he cannot recover."

Petitioner cannot prove that he would have ever fulfilled the conditions of the offer, *i.e.,* the recovery and collection of a judgment, of which he would have then been entitled to his moiety. The most that he can say is, that if Congress had not outlawed his action, he might have gone to trial and might or might not have been successful upon the trial and thereafter might or might not have collected some money on behalf of the United States.

Under settled legal principles therefore, petitioner had no vested right under any theory of contract law if there had been an offer of reward by a private person revoked before performance by petitioner of the conditions upon

which the reward was to be paid. *Shuey* v. *United States*, 92 U. S. 73.

Petitioner's claim is, essentially, that the former provisions of the statute created something analogous to an agency to prosecute this action. Under elementary principles of agency law, such a relationship was terminable at will by the principal.

> Restatement of the Law of Agency §118.
> Vol. 1 Mechem on Agency, §§563, 566 (Second Edition).

Petitioner asserts that if his relationship was one of agency it was an agency coupled with an interest because of his anticipated share of the judgment if one was recovered. He cites *Hunt* v. *Rousmanier*, 8 Wheat. 174 and Sections 138 and 139 of the Restatement of Agency. It is elementary that a power coupled with an interest is a power given as security and not to enable the recipient to earn a commission if successful.

> "If, however, the power so given is held for the benefit of the principal and the agent is interested in its exercise only because it entitles him to compensation for exercising it, then even though the principal contracts not to terminate it, and although the agent gives consideration therefor, as by acting or agreeing to act, the power is not a power given as security as the term is herein used." Section 138 Restatement (p. 351).

Hunt v. *Rousmanier*, 8 Wheat. 174, is illustrative. Plaintiff in consideration of a loan to the defendants' intestate of $1,450 was given a mortgage on the intestate's share in a ship. He was also given a power of attorney

authorizing him to sell the interest in the vessel, the power expressly reciting that it was given as security for the payment of the debt. The pleadings conceded that the powers were given "under the belief that they were, and with the intention that they should create, a specific lien and security on the said vessels" (8 Wheat 216). Under these circumstances the Court held that the power of attorney was not subject to revocation but pointed out the distinction between an interest such as the plaintiff in that case had because of his mortgage and an interest such as in the present case which cannot be considered coupled with the agency because it depends upon the exercise of the agency for its existence stating (8 Wheat. 204):

> "The words themselves would seem to import this meaning. 'A power coupled with an interest' is a power which accompanies or is connected with an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest' an interest in that which is to be produced by the exercise of the power, then they are never united. The power to produce the interest must be exercised, and by its exercise is extinguished. The power ceases when the interest commences, and therefore cannot, in accurate law language, be said to be 'coupled' with it."

In *Taylor* v. *Burns,* 203 U. S. 120, this Court said:

> "As such an instrument it was subject to revocation. It was not a power of attorney coupled with an interest. 'By the phrase "coupled with an interest," is not meant an interest in the exercise of the power, but an interest in the property on which the power is to operate.' *Hunt* v. *Rousmanier's Administrators,* 8 Wheat. 174. Now as we construe this

> contract, Taylor was to receive, in case he made a sale, seven-eighths of the price in excess of $45,000—that is, he was to be paid for making the sale. It was an interest in the exercise of the power and not an interest in the property upon which the power was to operate."

Petitioner's position is no stronger than that of an attorney undertaking the prosecution of a lawsuit on a contingent fee. This relationship may be severed by the client at any time and for any reason (*Martin* v. *Camp*, 219 N. Y. 170). Upon the conclusion of the relationship of attorney and client, the attorney ceases to have any standing whatever or right to proceed against the defendant in the case prosecuted by him. Whatever rights he may have to payment for services rendered up to that time are between him and his former client. They do not extend, as petitioner urges here, to the right to continue to prosecute a claim and collect upon it against his client wishes.

The foregoing shows that, even if petitioner's claim of contract were with a private person, he could acquire no right by the commencement of this action and his relationship was subject to termination at any time.

In the present case, however, we are not dealing with relationships between private persons nor with questions of contract law but with the relationship claimed to exist between the United States and the petitioner by virtue of a statute. The presumption is that a public statute is not intended to create private contractual or vested rights, but merely to declare a policy to be pursued until the legislature shall ordain otherwise (*Dodge* v. *Board of Education*, 302 U. S. 74).

Petitioner's position is certainly no stronger than that of a teacher who retires in the expectancy of receiving a pension pursuant to a law revoked after his retirement and after he had enjoyed the original pension provisions for some time (*Dodge* v. *Board of Education,* 302 U. S. 74). Nor is petitioner in any stronger position than a naval cadet appointed to the Naval Academy under a statute providing for his appointment to a commission in the Navy upon satisfactory completion of his studies, who was denied such an appointment because of an amendment to the statute, passed after he had completed two-thirds of his studies (*Crenshaw* v. *United States,* 139 U. S. 99).

The rule is stated in *Dodge* v. *Board of Education,* 302 U. S. 74, as follows:

> "In determining whether a law tenders a contract to a citizen it is of first importance to examine the language of the statute. If it provides for the execution of a written contract on behalf of the state the case for an obligation binding upon the state is clear. Equally clear is the case where a statute confirms a settlement of disputed rights and defines its terms. On the other hand, an act merely fixing salaries of officers creates no contract in their favor and the compensation named may be altered at the will of the legislature. This is true also of an act fixing the term or tenure of a public officer or an employee of a state agency. The presumption is that such a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise. He who asserts the creation of a contract with the state in such a case has the burden of overcoming the presumption."

Petitioner relies upon *Graham and Foster* v. *Goodcell*, 282 U. S. 409. Nothing in that case conflicts with the decision below. The holding of the case was that a tax statute might be applied retroactively to permit the Government to retain taxes collected by it which otherwise would have been recoverable by the taxpayer. The Court stated as a general rule that it is not consistent with due process to take away from a private party a right to recover an amount due when the legislation is passed, but went on to state (p. 429):

> "It is apparent, as a result of the decisions, that a distinction is made between a bare attempt of the legislature retroactively to create liabilities for transactions which, fully consummated in the past, are deemed to leave no ground for legislative intervention, and the case of a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice."

Petitioner argues (Pet. Br. 25-26) that the withdrawal by Congress of the jurisdiction of the District Court over this case is prohibited by the Fifth Amendment. He admits that Congressional power over the jurisdiction of the United States Courts is undisputed but argues that the action taken in the present case is the taking of his property by indirection and that Congress is without power to take away his remedy under his alleged contract with the United States. The difficulty with petitioner's argument is that this Court has held that Congress can do exactly that. (*Lynch* v. *United States*, 292 U. S. 571.)

There is no question here of a contract between private persons nor is there any question of action by a state pro-

hibited by the Fourteenth Amendment. Petitioner claims on the basis of an alleged implied contract between him and the United States. He makes no assertion of any contract, express or implied, between him and the respondent Anaconda Wire & Cable Company. It is true that this Court has held that a contract between a private person and the United States is protected by the Fifth Amendment against abrogation by Congress. In *Lynch* v. *United States,* 292 U. S. 571, this Court pointed out that Congress had the absolute right to amend or withhold any remedies by which a person might seek to enforce a contract between him and the United States, stating (pp. 580, 581):

> "Third. Contracts between individuals or corporations are impaired within the meaning of the Constitution whenever the right to enforce them by legal process is taken away or materially lessened. A different rule prevails in respect to contracts of sovereigns. Compare *Principality of Monaco* v. *Mississippi, ante,* p. 313. 'The contracts between a Nation and an individual are only binding on th conscience of the sovereign and have no pretensions to compulsive force. They confer no right of action independent of the sovereign will.' "

and at page 582:

> "When the United States creates rights in individuals against itself, it is under no obligation to provide a remedy through the courts. *United States* v. *Babcock,* 250 U. S. 328, 331. It may limit the individual to administrative remedies. *Tutun* v. *United States,* 270 U. S. 568, 576. And withdrawal of all remedy, administrative as well as legal, would not necessarily imply repudiation."

Thus, even if the Court were to find that some implied contract arose out of the former provisions of the False Claims Statute, it is clear that it was not a contract to maintain the District Courts of the United States for the benefit of this petitioner and that the remedies to be granted petitioner under such contract are at the sole discretion of Congress.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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DWIGHT R. COLLIN,
of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1945

No. 429

MOSES B. SHERR,

Petitioner,

against

ANACONDA WIRE AND CABLE COMPANY and
UNITED STATES OF AMERICA,

Respondents.

REPLY BRIEF FOR PETITIONER

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INDEX

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POINT I

Grounds for granting the writ of certiorari.

1. The decision below rests solely on the Circuit Court's holding that the taking of petitioner's right was proper because he can sue for compensation in the Court of Claims (R. 62). Although we have shown (main br. 27-31) that this ruling conflicts with numerous decisions of this Court, Anaconda finds not a word to defend it; and the Government, apart from a short reference to the Circuit Court's ruling (Gov't br. 13), makes no attempt to reconcile it with our authorities. Thus the decision below, undefended and, presumably, indefensible, stands on the books as a precedent to cast confusion into the Tucker Act and the Court of Claims Act unless this Court, on certiorari, shall correct it.

2. The Government says (br. 14) that at the time the False Claims Statute was amended only 51 *qui tam* actions were pending. The Government must be mistaken; for immediately before the amendment the Attorney General had advised Representative Hancock that "this bill, if passed, will kill about two hundred cases pending under the informer statute" (*Cong. Rec.*, 78th Cong., 1st Sess., p. 10,847, col. 1).

The Government also errs in saying (br. 14) that "the issue here involved has been raised in only two pending suits". Petitioner, with his very limited information, happens to know of four such suits;* it stands to reason that there are more; and even those dismissed might be reopened if this Court grants certiorari herein and reverses the Circuit Court.

3. The decision below would operate as a grave deterrent to all future *qui tam* actions, whether brought pursuant to the amended False Claims Statute or any other law (see Pet. 10-11). For under that decision every *qui tam* plaintiff will, until judgment, be subject to be ousted by the Government;** and "no one would be foolish enough to incur the trouble and expense, or even the ill will, incident to the prosecution of an action for any such forfeiture and damages, subject to the right of the treasury, on *ex parte* statements and personal solicitation, to remit the same", *U. S.* v. *Griswold*, 24 Fed. 361, at 366 (D. C. Ore., 1885). Since Congress manifestly intended to preserve *qui tam* suits, this Court should review the decision below which would remove their economic foundation.

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* They are: (1) the present case; (2) *U. S.* v. *Rockbestos Products Co. et al.*, Civ. No. 19-142 (D. C., S. D. N. Y.), now on appeal; (3) *U. S. ex rel. Nitkey* v. *Dawes*, No. 8757 (C. C. A. 7); (4) *U. S. ex rel. Rodriguez* v. *Weekly Publications, Inc.*, Civ. No. 23-282 (D. C., S. D. N. Y.).

** According to the Court below the Government could certainly oust the *qui tam* plaintiff by legislative action; and, according to Judge Clark (R. 62), the executive could do the same by "assuming enforcement itself", i.e., by bringing an independent suit.

4. Respondents suggest that petitioner brought this action with undue haste. But under a rule which tests a relator's rights by the priority of his suit (our main br. 17), speed of action should be no reproach; and respondents themselves invoked the priority of this action to defeat a later competing suit, *U. S.* v. *Anaconda W. & C. Co.*, 52 F. Supp. 824 (D. C., E. D. Pa., 1943).

Nor can the Government complain that petitioner outsped it in a "race to the courthouse". The Government's civil suit was commenced one year and five months after petitioner's action (R. 35, 36, 43, 44) and after the indictment of the defendants in Indiana (R. 17). Even after the defendants had pleaded *nolo contendere* in the criminal proceedings and had been sentenced in June, 1943 (R. 18, 44), the Government waited almost a year before bringing its civil suit (R. 36, 44).* Such tardiness is the very evil at which the False Claims Statute was aimed, see *U. S. ex rel. Marcus* v. *Hess*, 317 U. S. 537, at 547 (1943). The pendency of the present action does not excuse the Government's delay; for concededly the Government never viewed it as an obstacle to a suit of its own (R. 19). Nor had the Government ground to await the outcome of its criminal action against Anaconda in Rhode Island (Gov't br. 6); for that action involved different individuals and different wrongs (R. 44); and the Government had no difficulty in filing its civil suit for the Rhode Island frauds simultaneously with the Rhode Island indictment (R. 17).

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* The case is thus quite different from *U. S.* v. *Baker-Lockwood Mfg. Co.*, 138 F. 2d 48, at 51-53 (C. C. A. 8, 1943), where the Government, "proceeding with diligence and dispatch" (p. 52), brought its civil action within two days after the commencement of the *qui tam* suit and within three days after the return of the indictment (pp. 49-50).

POINT II

Petitioner has a vested right by operation of law.

1. Respondents attempt to minimize our English authorities (main br. 13-15) on the ground that, according to 2 *Blackstone* 436-8, *Parliament* may release a penalty even after a *qui tam* suit is brought (Gov't br. 8; Anaconda br. 14). But in England the constitutional protection of vested rights is addressed only to the *Crown;* 2 *Anson, Law and Custom of the Constitution,* Pt. 1 (4th ed., 1935), pp. 320-2. "It is the theory of the British Constitution that Parliament is omnipotent"; *Farrington* v. *Tennessee,* 95 U. S. 679, at 684 (1878); *Brinton Coxe, Judicial Power and Unconstitutional Legislation* (1893), pp. 178-80. While Parliament, therefore, has power to destroy the vested rights of a *qui tam* plaintiff, Congress, bound as it is by the Fifth Amendment, has not.

Moreover, Blackstone's remark, invoked by respondents, is addressed only to *"penalties"*. It is therefore inapplicable to the False Claims Statute which, far from being a "penalty" law, is compensatory in nature (our main br. 19).

2. Respondents (Anaconda br. 7-11; Gov't br. 9-11) invoke a long line of cases to demonstrate that the right to a penalty will be destroyed by the repeal of the penalty statute although a *qui tam* action for the penalty has been commenced.* The correctness of the rule may be granted; but it does not aid respondents.

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* Respondents' cases should be used with caution since many of them did not involve *qui tam* actions. Note particularly *U. S.* v. *Morris,* 10 Wheat. (23 U. S.) 246 (1825); *U. S.* v. *Connor,* 138 U. S. 61 (1891); and *U. S.* v. *25,000 Gallons of Distilled Spirits,* Fed. Cas. No. 14,282 (D. C., S. D. N. Y., 1867), aff'd Fed. Cas. No. 15,564 (C. C., S. D. N. Y., 1868). In each of these cases the claimant had furnished information to the Government; but the suit against the wrongdoer was brought by the Government itself, was under its sole control, and the informer was not a party thereto. The peculiar *qui tam* rules were, therefore, inapplicable. Furthermore, there existed in each of these cases a statute which expressly reserved the Government's right to remit the penalty or which expressly provided that no right was to vest in the informer until actual collection of the penalty. No comparable statute exists in the case at bar.

(a) The doctrine that penalty rights are defeasible by a repeal of the penalty statute despite commencement of suit is not limited to *qui tam* actions; it applies equally where the penalty suit is brought by the Government itself, *Yeaton* v. *U. S.*, 5 Cranch (9 U. S.) 281 (1809); *State* v. *Tombeckbee Bank*, 1 Stew. (Ala.) 347 (1828), or by an injured individual in his own right, *Norris* v. *Crocker*, 13 How. (54 U. S.) 429, at 440 (1851). The vulnerability of the penalty right thus has nothing to do with the *qui tam* character of the suit, but arises from the weakness inherent in every suit for a penalty.

A suit under the False Claims Statute is not one for a "penalty", but for compensatory damages (our main br. 19). Respondents have not disputed that. Their authorities are, therefore, inapplicable. A statutory right to *damages* (as distinguished from penalties) is "property" and, as such, protected by the Constitution even before judgment. *Ettor* v. *Tacoma*, 228 U. S. 148 (1913); *Denver, S. P. & P. R. Co.* v. *Woodward*, 4 Colo. 162, at 168 (1878).

(b) We have further shown (main br. 19-20) that, even if this were a penalty suit, the 1943 amendment did not "repeal" the penalty but reconveyed it to the Government. Respondents' authorities, dealing only with repeals, do not sustain such reconveyance.*

The Government claims (br. 10-11) that our distinction between "repeal" and "reconveyance" is unsound because a property right entitled to constitutional protection would be invulnerable to either type of statute. But the Court below recognized the validity of our distinction (R. 61), and we believe that the Government's attack is untenable.

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* The Government says (br. 11) that some of its cases did not involve the repeal, but the change of a penalty law. But "where a statute imposes a new penalty for an offence, it repeals by implication so much of a former statute as established a different penalty"; *Nichols* v. *Squire*, 5 Pick. (22 Mass.) 168 (1827, syllabus). Moreover, even the change of a penalty is not comparable to its appropriation by the Government.

It is our position that the rights of a *qui tam* plaintiff in a penalty suit are "inchoate" in the sense that they can be destroyed by a repeal of the statute;* but that they are "vested" in the sense that the Government cannot reappropriate them. The Government's argument, on the other hand, assumes that a right cannot be "inchoate" for one purpose and "vested" for another. But it is elementary that legal terms may have different connotations for different purposes. This is particularly true of the terms "vested" and "inchoate".

In *M'Lane* v. *U. S.*, 6 Pet. (31 U. S.) 404 (1832), this Court called the plaintiff's right "inchoate" as against a *release* of the penalty (p. 426); but called it "vested" as against the Government's *appropriation* of the plaintiff's share in the penalty (p. 427). The same shift in phraseology is found in *Robison* v. *Beall*, 26 Ga. 17, at 47 (1858). Our distinction between "repeal" and "reappropriation" of a penalty is thus well founded.

POINT III

Petitioner also has a vested right by reason of his contract with the Government.

1. Respondents (Anaconda br. 18-19; Gov't br. 11-12) deny that the commencement of this suit created a contract between petitioner and the Government; for, they say, R. S. § 3493 is so worded as to make the relator's right dependent upon the recovery of judgment and collection. The argument has been answered (our main br. 18-19). If A agrees to sell B a car and B agrees to pay $1,000 therefor, A cannot sue for the price unless he has made or tendered delivery. Yet no one would contend that prior to delivery or tender there exists no valid contract. And

* Primarily we say, of course, that the present action is not a penalty suit and would, therefore, be invulnerable even to a repeal of the statute.

it is well settled that the Constitution, embodying as it does the "doctrine of the sacredness of vested rights", "applies alike to both executory and executed contracts, by whomsoever made". *Farrington* v. *Tennessee*, 95 U. S. 679, at 683 (1878).

2. Respondents say (Anaconda br. 13-14; Gov't br. 12) that there is no contract because petitioner cannot be compelled to prosecute this case to judgment. But petitioner is obligated by R. S. § 3491 not to discontinue, which is certainly an enforceable obligation, *U. S.* v. *Samuel Dunkel & Co.*, 61 F. Supp. 697, at 700 (D. C., S. D. N. Y., 1945); and his obligation to pay costs and expenses is equally enforceable. Moreover, the first *qui tam* plaintiff to bring suit preempts the field, even as against the Government (our main br. 17); by taking that position he assumes serious fiduciary duties which are likewise enforceable; see *Young* v. *Higbee Co.*, 324 U. S. 204, at 209-214, and notes 10, 12 and 13 (1945). The analogous Rule 23 (c), F. R. C. P., which forbids discontinuance of stockholders' suits, is viewed as "forcing the original plaintiff-shareholder to continue the action and carry it through to judgment", 2 *Moore's Fed. Pr.* 2282.

3. Respondents' authorities (Anaconda br. 8-10; Gov't br. 11) do not negate a contract.

Atwood v. *Buckingham*, 78 Conn. 423 (1905), was not even a *qui tam* action. The plaintiff sued for a penalty in his own right and for his sole account. This is rather different from the present case where the Government invited petitioner to sue for its benefit.

In *Coles* v. *County of Madison*, 1 Breese (Ill.) 115 (1826), the relator made the curious argument that, by bringing suit, he had made a contract or quasi-contract *with the defendant*. The court rejected this contention (p. 117). The question of a contract between the relator and the Government was neither raised nor decided.

In *Cushman* v. *Hale*, 68 Vt. 444 (1896), a statute awarded one-fourth of certain fines to the prosecuting officer. The court held that, under this statute, the State's Attorney had no contract right to his share, because of the broad rule, laid down in *Butler* v. *Pennsylvania*, 10 How. (51 U. S.) 402 (1850), that the right of public officers to their salary or other compensation is not contractual in character. Petitioner is no public officer; see *Hall* v. *Wisconsin*, 103 U. S. 5 (1880).

In *Allen* v. *Farrow*, 2 Bailey (18 S. C., Law) 584 (1831), a penalty statute was repealed while a *qui tam* suit for the penalty was pending. The relator argued that the State had contracted away its right to repeal the statute (p. 585). Without specifically answering this argument, the court sustained the repeal on the ground that the right to a penalty does not vest before judgment and collection (p. 586).

This decision does not help respondents. It is one thing to say that the State did not surrender its power to change its penal laws. It is a different thing to argue, as respondents do, that the Government, without repealing the penalty, may appropriate the relator's share. The State transferred to the relator the right to the penalty such as it was, i.e., defeasible by repeal of the statute. *Pope* v. *Lewis*, 4 Ala. 487, at 492 (1842). But short of a repeal of the penalty, the State was contractually bound to permit the relator the continued prosecution of his suit.

4. To disprove a contract, Anaconda (br. 11-13) invokes the so-called "bounty cases", *Salt Company* v. *East Saginaw*, 13 Wall. (80 U. S.) 373 (1872), followed in *Welch* v. *Cook*, 97 U. S. 541 (1878). Their pertinence is hard to see. The word "bounty" negatives the idea of a consideration, *Grand Lodge* v. *New Orleans*, 166 U. S. 143, at 146 (1897); it is treated as synonymous with "gratuity" and implies that "nothing (is) given in exchange", *Maricopa County* v. *Valley National Bank*, 318 U. S. 357, at 362 (1943). Since it is not suggested that the False Claims

Statute awards the relator's share gratuitously or without consideration, the bounty cases do not advance respondents' argument.

In *Salt Company* v. *East Saginaw, supra,* a Michigan statute had provided an annual bounty and tax exemption for all companies manufacturing salt in the State. Upon repeal of the statute, the Salt Company claimed a contract right to continued tax exemption. This Court rejected the claim because "the parties who entered upon the business (did not) promise how long they will continue the manufacture" and were "at liberty at any time to abandon such a course", so that merely "an arrangement determinable at the will of either of the parties" arose (13 Wall., at 377). By contrast petitioner, by commencing this suit, committed himself not to discontinue it. The Government, having stipulated this obligation, cannot now argue that the arrangement was "determinable at the will of either of the parties".

Moreover the statute involved in *Salt Company* v. *East Saginaw, supra,* was "a law dictated by public policy and the general good" (13 Wall., at 377). The False Claims Statute, on the other hand, was made by the Government to enlist private help in the collection of its claims. Such a statute lends itself more readily to contractual implications than a mere bounty law (our main br. 22-23).

5. Respondents (Anaconda br. 21, 23; Gov't br. 13) impute to us the claim that petitioner's position is analogous to that of an agent or attorney of the Government. But this very analogy has been most vigorously rejected in our main brief (24-25). Petitioner, we say, is the Government's assignee; and respondents have advanced no argument to refute this.

Proceeding on their false premise, respondents say (Gov't br. 13; Anaconda br. 23) that petitioner may sue the Government in the Court of Claims for the breach of the agency contract. However, the Government neither made an agency contract nor breached it. The Govern-

ment's contract did consist of the assignment to petitioner of the Government's rights,* in return for petitioner's undertaking to prosecute the case at his own expense and to pay over one-half of the proceeds to the Government. The essential part of the Government's bargain is thus performed; the assignment is consummated; and petitioner has neither ground nor occasion to sue the Government for breach of the contract. This also disposes of Anaconda's suggestion (br. 6) that this action seeks to compel specific performance by the Government.

POINT IV

Denial of federal jurisdiction by the 1943 Amendment of the False Claims Statute is tantamount to the destruction of petitioner's right.

Respondents (Anaconda br. 25-27; Gov't br. 14) attempt to support the denial of jurisdiction by invoking *Lynch* v. *U. S.*, 292 U. S. 571, at 580-2 (1934). But the *Lynch* case merely restates the old rule that the United States may not be sued without its consent and that the consent may be withdrawn at any time. "When the United States creates rights *against itself*, it is under no obligation to provide a remedy through the courts" (292 U. S., at 582, italics added). But here petitioner asserts no rights against the United States. It is not a defendant; no relief is sought against it. Petitioner's right was assigned to him by the United States; but it is directed, and he asserts it, only against Anaconda. To such a suit the rule of sovereign immunity, announced in the *Lynch* case, does not apply.

Respectfully submitted,

Moses B. Sherr,
Petitioner *pro se*.

Dated: October 17, 1945.

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* A *qui tam* suit for a penalty "is, in effect, a transfer by the State to one of its members of a penalty forfeited to the body politic", *Pope* v. *Lewis*, 4 Ala. 487, at 492 (1842).